U.S. Trade Barriers and Canadian Minerals: Copper, Potash and Uranium

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Foreword

In the years following World War II, the United States was a strong proponent of liberalized multilateral trade and the acknowledged leader in world trade. The recent emergence of the newly industrialized countries as competitors not only in the world markets but also in the U.S. domestic markets appears to have produced a generation of protectionists. The authors of this book examine the evidence of a trend toward increasingly protectionist activity on the part of trade policy-makers in the United States. Starting with an analysis of the current international GATT-centric trading system, the book discusses the history of trade legislation in the United States as a background for consideration of tariffs and non-tariff barriers to trade between the United States and other countries.

Examining the experience of trade in three minerals for which the United States has provided a market for Canadian producers, the authors analyze decisions involving U.S. imports of copper, potash and uranium in terms of their history, the structure and philosophy of the decision-making process, and their effects on Canadian-American trade in these commodities. The "trade war" between Saskatchewan potash producers and those in the United States who believed that imports threatened the existence of domestic producers provides a detailed example of attempts to use antidumping legislation to block the import of products which can be produced more economically outside the country. Copper, a product of industries feeling the threat of offshore producers and fabricators, has been the subject of two recent efforts to block imports by means of escape-clause ("Section 201") legislation. In the case of uranium, a third U.S. industry facing questions about its viability, considerations surrounding the idea of strategic minerals are a major focus.

The book also examines the past and potential impacts of the Free Trade Agreement and the current round of the General Agreement on Tariffs and Trade on trade between Canada and the United States, with particular emphasis on these three minerals. In thoughtful and articulate style, the authors consider the implications of current U.S. thought and practices for international trade, as well as the special circumstances surrounding trade in three of Canada's most important minerals.

The Centre for Resource Studies is pleased to present this comprehensive study of U.S. trade-policy issues. The views expressed are those of the authors and do not necessarily represent those of the Centre or its sponsors.

Moira Jackson
Assistant Director

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Acronyms

CCP	Central Canada Potash
CVD	countervailing duty
DISC	Domestic International Sales Corporation
DOE	(U.S.) Department of Energy
EEC	European Economic Community
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GSP	generalized system of preferences
ITA	International Trade Administration (of the U.S. Department of Commerce)
ITC	(U.S.) International Trade Commission
KCl	potassium chloride
LDC	less-developed country
LTFV	less than fair value
MFA	Multi-Fiber Agreement
MOP	muriate of potash
NIC	newly industrialized country
NTB	non-tariff barrier
OECD	Organization for Economic Cooperation and Development
OMA	orderly marketing agreement
PCA	Potash Company of America
PCS	Potash Corporation of Saskatchewan
UPA	Uranium Producers of America
USTR	U.S. trade representative
VER	voluntary export restraint

1. Introduction

In Canada in the mid-1980s, political commentators were fascinated with a spectre that seemed to be haunting the land - the spectre of U.S. protectionism. During the course of this decade, one image seemed to have fastened itself like a lamprey upon the collective consciousness of Ottawa: the prospect of a swelling protectionist tide in the United States, rendering increasingly problematical Canada's access to its biggest market. To be sure, commentators could and did differ (often depending upon party affiliation) on the gravity of the U.S. protectionist threat, just as they could and did differ on the reformability of the international, GATT-centred trading system that has been coming under attack from a variety of quarters in the last decade. But few serious students of Canada's economic prospects would imagine that the current trading regime, whether in its bilateral or multilateral dimensions, is functioning effectively. Quite the contrary, most would agree that the regime is looking progressively less capable of serving Canadian interests in an ever-more competitive environment.

Coupled with this anxiety about a defective international trading system has been a pair of assumptions about Canada's foreign economic fortunes. The first is the conviction, so widespread within official Ottawa as to constitute an article of faith, that Canada is much more sinned against than sinning in the current era of "neo-mercantilism."[1] A Canadian high-tariff past, it is argued, has been renounced in favour of a present in which Canada's economic

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[1] The term refers to the spreading incidence of "managed trade" in one guise or another, with particular emphasis upon the resort to nontariff barriers against imports coupled with the readiness to grant preferential treatment to exports. For a discussion of neo-mercantilist practices, see David H. Blake and Robert S. Walters, *The Politics of Global Economic Relations*, 2nd ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1983), chap. 2: "World Trade Dilemmas"; Melvyn B. Krauss, *The New Protectionism: The Welfare State and International Trade* (New York: New York University Press, for the International Center for Economic Policy Studies, 1978); Charles Lipson, "The Transformation of Trade: The Sources and Effects of Regime Change," in *International Regimes*, ed. Stephen D. Krasner (Ithaca, N.Y.: Cornell University Press, 1983), pp. 233-71; Murray L. Weidenbaum, "The Drift to Protectionism," *Challenge*, March/April 1983, pp. 44-47; and John Hein, "A New Protectionism Rises," *Across the Board*, April 1983, pp. 22-30.

interests clearly dictate that impediments to trade must be removed if the country is to achieve its full potential.[2] In the manner of reformed alcoholics everywhere, Canada's trade establishment preaches ardently the new doctrine of abstinence from protection. And no country, or so it is argued, is more in need of the sermonizing than the United States, which is viewed by all segments of Canadian political opinion as being already well along on a trade-obstructing binge.[3] It is curious, as well as ironic, that Canadians and others regard Americans in the same way as the latter see *their* trading partners, as cheats who simply refuse to play according to the rules of the game; hence the near-universal clamour in Washington to "level the playing field." Just as Canadians inveighed against the U.S. guerrilla warfare upon their economic interests, which began to look exceedingly worrisome by mid-decade, so too did Americans see foreign trading practices, above all those associated with "subsidization," as eating away at one U.S. comparative advantage after another, in a variety of sectors ranging from high-tech industry to agriculture.[4] Even Canada, for so long basking in the security that neglect can confer, by mid-decade began attracting the attention of scores of U.S. industries, grown alarmed at the degree to which their domestic market has been penetrated by "unfair" traders from the north.

Part of the U.S. grievance against Canada has in fact been based upon simple objective indicators, such as the annual merchandise-trade surplus Canada has been enjoying of late in its trade with the United States - a

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2 The consensus around the National Policy of 1879, for years the standard of protectionist rectitude in this country, has been eroding rapidly in the past two decades. For a good discussion of the evolution, logic, and ideological justification of the 1879 policy, see Ben Forster, *A Conjunction of Interests: Business, Politics, and Tariffs 1825-1879* (Toronto: University of Toronto Press, 1986).

3 Ronald Anderson, "U.S. Trade Moves Increasingly Unfair and Dangerously Tending to Anarchy," *Globe and Mail* (Toronto), 5 February 1987, p. B8; Peter Cook, "Who is the Fairest Trading Nation of Them All?" *Globe and Mail*, 3 September 1987, p. B2.

4 The penultimate presidential-election year, 1984, may have constituted the high-water mark for protectionism in the postwar United States, with a flood of petitions being filed with the International Trade Commission for relief from imports. Steven Greenhouse, "The Making of Fortress America," *New York Times*, 5 August 1984, p. F1. Also see Bruce Stokes, "Bill Brock Sees 'Damn Little Equity' in America's Trading Relationship," *National Journal*, 15 December 1984, pp. 2397-98.

surplus that was approximately $17 billion in 1987.[5] However, much of this grievance can also be traced to the subjective appreciation on the part of many Americans that Canadians simply *must* be practising unfair trade (along with predatory investment strategies); how else could they be doing so well of late? Louisiana Governor David Treen articulated this appreciation during an early-1980s oil-investment wrangle involving FIRA and a company with interests in his state: "I believe we should closely examine what appears to be an enormous, unfair advantage being granted to Canadian companies by the Canadian government, an advantage that markedly enhances their ability to do business in the United States...[A]s a matter of national policy, the apparent inequities in the situation should be fully explored."[6] Treen may have had oil in mind, but it can safely be said that for many Americans, *all* domestic enterprises - even Christmas tree farms! - are coming under attack from predators based in Canada and cossetted by an array of subsidies.[7]

The second guiding assumption that informs much thought about Canadian economic prospects is the belief that Canadian exporters have an entitlement to sell in the U.S. market, an entitlement that is in danger of being withheld as a result of the constant recourse by U.S. industries to mechanisms in U.S. trade law that have been designed to cushion the shock of foreign competition.[8] It has been the quest for ensured access to the U.S. market - in other

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5 Clyde Graham, "'Deteriorating' Trade Trend Pushes Canada's Surplus to Lowest in Seven Years," *Globe and Mail*, 13 February 1988, p. B5. The 1987 figure does, however, represent a decline from the previous year's surplus of $18.4 billion. (Values are represented in Canadian dollars.)

6 Quoted in Andrew H. Malcolm, *The Canadians* (Toronto: Paperjacks, 1986), pp. 222-23.

7 Susan B. Lane, "Oh, Christmas Trees," *Valley Advocate* (Springfield, Mass.), 22 December 1986, p. 12: "Increasingly, trees are being imported from Canada, where ... growers are government subsidized."

8 A synopsis of the relevant statutes and regulatory mechanisms can be found in "U.S. Trade Laws," *Business America*, 8 December 1986, pp. 2-15. For laws and regulations that are particularly applicable to minerals trade, see Charles H. Blum, "The Effect of Government Policies on Minerals Trade-Relief Measures," *Materials and Society* 8, 3 (1984): 501-4; and Shirley A. Coffield, "United States-Canada Natural Resources Trade: Sources of Conflict/Prospects for Agreement," in *Trading Canada's Natural Resources: Essays from the Third Banff Conference on Natural Resources Law*, ed. J. Owen Saunders (Toronto: Carswell, 1987), pp. 121-53.

words, for a codification of the entitlement expectation - that underscored the Mulroney government's interest in securing a free-trade agreement with the United States. As then-Minister of International Trade Pat Carney phrased it in early 1987, during the aftermath of the vituperative softwood-lumber dispute between Canada and the United States, "very simply, ... we are seeking secure and enhanced access to the U.S. market, through a long-term, binding treaty..."[9] Lest it be assumed that it is only from government benches that one hears the concern for securing access to the U.S. market, it should be noted that opposition parties, even those most animated against free trade with the United States, have also made it clear that they assume a Canadian right to sell in the U.S. market.

Consider the response of New Democratic Party leader Ed Broadbent to yet another bilateral-trade dispute, the March 1986 "shakes and shingles" episode, in which the Reagan administration imposed tariffs (initially of 35 percent) on imports of red cedar shakes and shingles, after the U.S. International Trade Commission recommended import relief be granted.[10] What, he demanded, was the Mulroney government prepared to do in response to this challenge to Canadian interests, so that Canadian shakes and shingles might be guaranteed access to U.S. markets? No less expectant, insofar as access to the U.S. market is concerned, have been the Liberals, who among others during the 1988 Canadian federal election campaign made a near-fetish of the Auto Pact, which they would preserve inviolate, because they believe (in the event, quite rightly) that it is a guarantor of auto exports to the United States.[11]

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9 *Globe and Mail*, 7 February 1987, p. D7. The softwood-lumber dispute had been settled on 30 December 1 when Ottawa agreed to impose a 15-percent export tax on $4 billion worth of lumber exports to the United States, in exchange for the U.S. lumber industry withdrawing its petition for countervailing duties against Canadian lumber. Hyman Solomon, "Time Will Tell Price of Lumber Deal," *Financial Post*, 5 January 1987, p. 7.

10 This decision, taken pursuant to Section 201 of the Trade Act of 1974, was not a "countervail" case, although it was often made to appear so in press reports in Canada. This statutory trade remedy, along with a host of other U.S. legislative and regulatory trade mechanisms, will be discussed in some detail in subsequent chapters. For the shakes and shingles case itself, see Coffield, "United States-Canada Natural Resources Trade," p. 140.

11 For a useful discussion of the Auto Pact in the context of North American automotive trade, see James F. Keeley, "The Automotive Sector," *International Journal* 42 (Winter 1986/87): 78-106.

The point of the above discussion is not to pronounce judgement on the merits of the Free Trade Agreement (FTA) signed in January 1988 by Ottawa and Washington. Whatever the strengths and weaknesses of that accord, and notwithstanding the emotional and at times vitriolic debate it engendered during the 1988 election, what cannot be disputed is that it represented, for many in this country, the culmination of a decade-long journey to safe harbour from the stormy seas of the international trade regime.[12] To repeat the claim made in our introductory sentence, there has indeed been an obsession, on the part of Canada's trade bureaucracy, with the goal of seeking refuge from the maelstrom of protectionism. This obsession can perhaps be traced back to the remarkable report of the Standing Senate Committee on Foreign Affairs (the Van Roggen Committee) that recommended Canada seek free trade with the United States, something that at the time (1978) was still considered very much a taboo subject for official governmental bodies to raise.[13] Seven years later, when the Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Commission) made a similar recommendation, the suggestion, while still heretical to many, had at least attracted a substantial constituency, such had the conviction spread that the country's trade horizons were becoming darker and darker.[14]

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[12] The major aspects of the bilateral free-trade accord are outline in the official publication, *The Canada-U.S. Free Trade Agreement Synopsis* (Ottawa: Department of External Affairs, 1987). The negotiations leading to the accord have stimulated a rather sizable body of writing in the past year on the subject of Canada-U.S. free trade. Among the best examples of this writing are *Knocking on the Back Door: Canadian Perspectives on the Political Economy of Freer Trade with the United States*, ed. Allan M. Maslove and Stanley L. Winer (Halifax: Institute for Research on Public Policy, 1987); *Perspectives on a U.S.-Canadian Free Trade Agreement*, ed. Robert M. Stern, Philip H. Trezise, and John Whalley (Washington: Brookings Institution; Ottawa: Institute for Research on Public Policy, 1987); and *Building a Canadian-American Free Trade Area*, ed. Edward R. Fried, Frank Stone, and Philip H. Trezise (Washington: Brookings Institution; Ottawa: Institute for Research on Public Policy, 1987).

[13] Canada, Standing Senate Committee on Foreign Affairs, *Canada-United States Relations*, vol. 2: *Canada's Trade Relations with the United States* (Ottawa: Queen's Printer, June 1978).

[14] *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, vol. 1 (Toronto: University of Toronto Press, 1985). For a discussion of the sense of pessimism that pervaded the contemplation of Canadian trade prospects at mid-decade, see David G. Haglund, "Unbridled Constraint: The Macdonald Commission Volumes on Canada and the International Political Economy," *Canadian Journal of Political Science* 20 (September 1987): 599-624.

Although many in Canada now understand the country's economic well-being to be increasingly held hostage to a random and arbitrary trading regime, few seem to be aware of some of the salient characteristics of that regime. The complexities of the GATT continue to elude comprehension on the part of the Canadian public and of many federal and provincial politicians. This should come as no surprise, for the international legal aspects of multilateral trade are sufficiently baffling to defy even experts in the field.[15] More surprising, and (we argue) disturbing is the lack of understanding of U.S. trade policy, laws and regulations. This is not to claim that the U.S. system is any less baffling than the multilateral regime, but it is to remark that, given Canada's outsized dependence on the U.S. market for its exports (close to 80 percent in 1987), the consequences of ignorance can be much more severe than in the case of the multilateral arena. At the very least, the existence of such ignorance is less excusable, given the stakes involved.

The Province of Saskatchewan, which figures largely in two of the three commodity cases that we study in this book, renders some illustrative testimony to the above problem. As we shall show, Saskatchewan has been on the receiving end of protectionist pressure in two important mineral commodities, uranium and potash, as well as in a set of other industries. In both these commodities, and especially potash, the single most important market for provincial producers is the United States. And in both these commodities, significant challenges have been mounted by domestic U.S. producers, ably backed by their Congressional supporters. During the last quarter of 1987, there was much talk of a trade war that involved some of the province's most important productive sectors. While a good deal of hyperbole attended the trade-restriction efforts launched against the two commodities, there was a core of substance to the trade-war allegation: large antidumping duties seemed likely to be levied against several of Saskatchewan's potash companies; and a U.S. court decision appeared to put in question the entire U.S. market of the Saskatchewan uranium industry.

As we shall detail in chapter 4, the uranium industry faced the prospect of seeing the U.S. utilities market being precluded from utilizing foreign uranium

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[15] A good starting point for unravelling some of the mysteries of the GATT, and especially its dispute-resolution mechanisms, is Donald McRae, "Recourse to the GATT for Resolving International Trade Disputes," in *Trading Canada's Natural Resources*, pp. 168-88. Also see Jock A. Finlayson and Mark W. Zacher, "The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions," in *International Regimes*, pp. 273-314.

for its nuclear reactors, by a ruling of a federal district court judge in Colorado. The ruling covered foreign uranium that needed to be enriched in U.S. facilities operated by the Department of Energy, and Canada has no domestic enrichment facilities. The federal court judge, James Carrigan, ruled on 20 June 1986 that the Department of Energy was indeed in violation of a U.S. regulation that seemingly required a ban on such imports. Although the decision had potentially profound importance for the province's uranium industry, when it was announced it literally took trade officials, as well as industry executives, by surprise. Many in Regina and Saskatoon were unsure about the implications of this decision. One private-sector mining executive went so far as to remark that it did not really concern him, because "the decision was made by a Colorado judge, and we don't sell any uranium in Colorado."[16] In reality, the judge's writ was binding, pending a stay and an appeal, upon the entire United States.

If the province's battles against U.S. protectionist forces constituted a trade war, then one influential Senator, New Mexico's Peter Domenici, loomed as the U.S. commander-in-chief. Although Domenici has in the past year or so become more widely known in the province (for example, an informal survey taken of Saskatchewan school children indicated he was something of a role model), there was an amazing lack of accurate information about him and other Congressional foes of Saskatchewan interests as late as 1986, when the protectionist challenge to Saskatchewan commodities really was becoming apparent. For instance, by late June 1986 Domenici had already been instrumental in aiding the U.S. uranium lobby in its battle for import relief, and was clearly maneuvering with the Secretary of Commerce, Malcolm Baldrige, to get "fast-track" action on any potential antidumping petition launched against Canadian potash producers.[17] At the same moment, the minister responsible for the Potash Corporation of Saskatchewan (PCS), Paul Schoenhals, could claim in the Legislative Assembly that Domenici was a Democrat. The minister's remark was intended to serve two purposes: first, it was designed to highlight the Devine government's conviction that Saskatchewan's natural allies in the United States on trade matters were the Republicans, and not the Democrats who were seen as the staunch protectionists; secondly, it was an implicit assumption of the government in Regina that the

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[16] Interview, Regina, 3 July 1986.

[17] "Canada 'Dumping' Potash: U.S.," *Star-Phoenix* (Saskatoon), 25 June 1986, p. C7.

NDP opposition, seen to favour the Democrats in the United States, could not understand where the province's real interests lay, thus could not hope to defend them successfully if ever given the chance again by the electorate. The minister's statement had a consummate political logic to it; the only problem was that it was erroneous.

It should not be assumed that scanty knowledge about U.S. trade policy and law is the sole preserve of the government side of the house. In an equally remarkable display of confusion, the soon-to-be leader of the opposition, Roy Romanow, rose in the Legislative Assembly to dispute a claim made by the minister of trade, Robert Andrew, that protectionism was rising in the United States. The exchange came in the early autumn of 1987, a month after a preliminary finding by the U.S. Department of Commerce resulted in some steep dumping margins being assessed against most of the province's potash producers; in other words, the local press had for weeks been full of stories of "potash war" by the time Romanow challenged Andrew's "Chicken Little" perspective with the remark that there had, despite the tales of unrelenting protectionist assaults on Canadian interests, been only 13 "countervail kind of actions of the kind that we're seeing in potash..."[18] As with Schoenhals' remark of the previous year, Romanow's similarly reflected an unfortunate lack of accuracy. Whatever else the provincial potash sector had confronting it, it was not U.S. countervail law, but rather U.S. antidumping law.

It would be easy to multiply the number of such instances of misunderstanding, but the purpose of the above examples is not to suggest that a few individuals who ought to know better should display such lack of comprehension about major issues in the provincial economy; rather, it is to make the case that there is a fairly general lack of good information, and not just on the part of those in government, about the nature and extent of the protectionist challenge that Saskatchewan and other commodity-producing provinces have been confronting in the past half-decade. It is one of our objectives in this book to try to shed some light upon the complex aspect of that challenge in a trio of commodities: copper, potash, and uranium.

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[18] Legislative Assembly of Saskatchewan, *Debates and Proceedings*, 28 September 1987, p. 2913. (Hereafter cited as Saskatchewan *Hansard*.) For a further instance of this problem, only this time from the government side of the Legislative Assembly, see the statement made by Energy and Mines Minister Patricia Smith, who was commenting upon an apprehended U.S. oil-import tax in the following manner: "I believe it's [i.e. the tax] an action related to oil and imports under section 201 of some legal document in the United States," ibid., 18 April 1988, p. 672.

In addition to analyzing the particular issues that have faced, and may continue to face, Canadian producers of these products, we also seek in this book to fulfill another aim: to put into context the current debate over the "new protectionism". Particular emphasis is placed on how and why the United States, for so much of the post-World War II period the acknowledged champion of liberalized, multilateral trade, should be seen to be emerging in recent years as a major generator of trade-distorting practices. It is not our purpose to claim that the United States is in some concrete way becoming "more" protectionist than its trading partners, although there are many who would seem to think this is so. Rather, we take as our point of departure the contention that the current generation of policy-makers in Congress seems to be less committed to trade liberalization than its post-1945 predecessors.[19] Thus, even if the United States is in some knowable manner not trading as "unfairly" as its partners (which seems, as we indicate above, to be the near-universal view in Washington), it still is worth noting that there has been an appreciable decline in its commitment to the earlier liberalized trading norm.[20]

It should be said at the outset that not all would share our view that U.S. protectionism is becoming a more significant factor in international political economy. *The Economist,* with typically authoritative aplomb, announced in January 1988 - prematurely, as it turned out - that "the shadow of protectionism is passing, raising hopes that Trade imbalances will be adjusted by growth, not by trade wars and recession."[21] And then U.S. Trade Representative,

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[19] A good analysis of the degree to which Congress has actually practised protectionism (as opposed to preaching it) is found in Robert A. Pastor, *Congress and the Politics of U.S. Foreign Economic Policy, 1929-1976* (Berkeley: University of California Press, 1980). But for a differing view that stresses the enhanced assertiveness in Congressional oversight of U.S. trade politics, cf. Jock A. Finlayson, "Canada, Congress and U.S. Foreign Economic Policy," in *Royal Commission on the Economic Union and Development Prospects for Canada;* vol. 29: *The Politics of Canada's Economic Relationship with the United States,* ed. Denis Stairs and Gilbert R. Winham (Toronto: University of Toronto Press, 1985), pp. 127-77.

[20] There is particular concern, in some of America's trading partners (though not Canada), about "super-301" pressure being applied to force open markets abroad for U.S. exporters. See "Talking Loudly and Carrying a Crowbar," *The Economist,* 29 April 1989, pp. 23-24.

[21] "The Year of Exporting Furiously," *The Economist,* 9 January 1988, p. 59. In little more than a year, however, this same journal would accomplish a 180-degree turn on this very question. See the decidedly pessimistic cover editorial, "The Ravishing of Trade," 25 March 1989, pp. 13-14: "More than at any time since the second world war, the fair maiden of free trade is

Clayton Yeutter, made no secret of his conviction that, although numerous trade problems afflicted America's economic relationships with its major allies and trading partners, it was alarmist to speak of a trade war between the United States and the EEC, or between the United States and Japan.[22]

Yeutter's point may be well-taken. A trade war, on the pattern of that which racked the world during the 1930s, is probably some years away, if indeed there is to be one at all. Nevertheless, there have been some ominous signs of late, particularly in respect of trade friction between the United States and Japan, as well as the East Asian newly industrializing countries or NICs (the so-called "four dragons" of South Korea, Taiwan, Hong Kong, and Singapore).[23] Nor have U.S.-European trade relations been marked by an excessive degree of bonhomie of late. And the early successes of Missouri Congressman Richard Gephardt in the opening rounds of the 1988 contest for the presidential nomination of the Democratic Party did give some sober-minded individuals reason to pause and contemplate the effect he might have on the global trading regime if he were elected president. Noted the *New York Times'* E. J. Dionne, "Representative Richard A. Gephardt of Missouri, who brings free-traders to apoplexy, may be on the verge of building a formidable coalition of the disaffected."[24] As it developed, it was Gephardt himself, and not the global trading regime, that most immediately required rescue. However, his withdrawal from the presidential race could hardly have been

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in mortal danger."

22 Clayton Yeutter, "We Are Not Close to a Trade War," *European Affairs*, Autumn 1987, pp. 25-30.

23 "Sir Richard and the Dragons, "*The Economist*, 13 February 1988, p. 29. Also see Bruce Stokes, "New Rivals in Asia," *National Journal*, 9 May 1987, pp. 1116-19. Among the more trenchant analyses of the economic and political consequences of continued U.S.-Japanese trade disagreements have been Theodore H. White, "The Danger from Japan," *New York Times Magazine*, 28 July 1985, p. 22; George Packard, "The Coming U.S.-Japan Crisis," *Foreign Affairs* 66 (Winter 1987/88): 348-67; Martin E. Weinstein, "Trade Problems and U.S.-Japanese Security Cooperation," *Washington Quarterly* II (Winter 1988): 19-33; and C. Fred Bergsten and William R. Cline, *The United States-Japan Economic Problem*, Policy Analyses in International Economics 13 (Washington: Institute for International Economics, October 1985). Also see Allan I. Mendelowitz, "U.S.-Japanese Economic Relations," GAO-T-NSIAD-87-36 (Washington: U.S. General Accounting Office, 9 June 1987).

24 E.J. Dionne, Jr., "Candidates Flail Away, but 'Undecided' is Still Ahead," *New York Times*, 21 February 1988, p. E1.

interpreted as a sign that free-trade sentiment was on the rise last year among the American electorate.[25]

Canada was never targeted by irate Congressional trade-restrictionists to anything remotely like the degree that Asian and European countries were targeted. Nonetheless there have been enough trade challenges that have either indirectly, as in copper, or directly, as in uranium and potash, affected Canadian producers over the past few years to stimulate anxiety among Canadian federal and provincial trade officials. As Saskatchewan's trade minister, Robert Andrew, dramatically expressed it: "American protectionism is real, and American protectionism is extremely ugly...It strikes the heart of every citizen of our province.[26] Echoing this sentiment was Canada's Ambassador to the United States, Allan Gotlieb, who warned in early 1988 against the assumption that protectionist pressure in Washington was abating. "The wolf is still a wolf, and it is still at the door. Protectionism is still alive and well in the United States. It is not a short-term phenomenon."[27]

In the following chapters, we shall develop our argument about both the general problem of rising protectionism in the United States and the specific ways in which three important Canadian commodity-producing sectors have been implicated in this upswelling of trade-restrictionist pressure. We have selected our commodities as examples primarily because they comprise a set of industries that have been exposed to some of the major aspects of U.S. trade law and policy that have come to be subsumed under the label of the new protectionism. That is, they have been the subject of efforts to achieve "contingent protectionism" on the part of injured domestic actors in the United States.[28]

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[25] Clyde H. Farnsworth, "Protectionist Mood is Diminishing in Trade Bill Negotiations," *New York Times*, 13 March 1988, p. E4. Three months later, this same writer would sound a more pessimistic note; cf. Farnsworth, "Bloc by Bloc, the World is Raising Trade Barriers Again," *New York Times*, 12 June 1988, p. E2.

[26] Saskatchewan *Hansard*, 23 September 1987, p. 2784.

[27] "The Trade Imperative," *Globe and Mail*, 2 February 1988, p. A6.

[28] The term "contingent protectionism" was apparently coined by Rodney Grey, and encapsulates the shift from the tariff barriers of the "old protectionism" to a greater reliance on non-tariff barriers and other "stand-by" (or "contingent") measures in the new protectionism. See Richard G. Lipsey and Murray G. Smith, *Taking the Initiative: Canada's Trade Options in a Turbulent World* (Toronto: C.D. Howe Institute, 1985), pp. 22-23.

For potash, the threat seemed clear enough: antidumping laws have been brandished twice since 1969 in an attempt to modify Canadian production and marketing practices. And with some success, in that in each instance the government in Regina intervened in the market place to regulate production of potash, in response to the threat of antidumping duties being levied by the United States. Thus, we concentrate in our potash chapter on the antidumping law and practices of the United States. Ironically, the "lesson" of our potash chapter, at least for the short run, is that a measure of protectionist pressure, administered through the medium of an antidumping investigation, could actually be *beneficial* for exporters!

Copper serves to highlight some other important elements of U.S. trade law and administration, in particular the infamous "Section 201" process, so often employed as a synecdoche for the new protectionism à l'américaine. Twice in the past decade - in 1978 and again in 1984 - the U.S. copper industry sought relief from imports under this section of the Trade Act of 1974. In neither case did it get what it wanted, leading us to remark that Section 201 actions are not the most likely menace facing Canadian copper (or other commodity) exports to the United States despite the reputation that this particular element of U.S. trade law seems to have acquired outside the United States. Instead we argue that, to the extent Canadian copper producers face protectionist pressure in the future, it will likely take the form of countervailing duties. Thus we explore both the 201 process and the countervailing duty law and procedure in our chapter on copper.

Our final case study, uranium, offers an opportunity to examine the extent to which regulatory and judicial agents can inject themselves into trade matters in respect of the one commodity in Canada-U.S. trade that has been, over time, the most "strategic" of minerals. Given its peculiar role, both in military and civilian-energy use, it is not surprising that uranium should have given rise to a series of complex regulations that have often been justified in terms of "national security." Although it is fashionable in some quarters to deride the national-security argument as a convenient device for protecting inefficient domestic industry, we argue against such a perspective in our chapter. Instead, we grant a certain - albeit circumscribed - validity to the argument, and note that uranium trade between Canada and the United States has for some time been attended by political and security considerations. We see some reason to anticipate that such may be the case in the future as well, the Free Trade Agreement notwithstanding.

The major reason we have selected these three commodities is because of what each says about particular aspects of U.S. trade law and practice. A

secondary consideration is to be found in what each of our three cases says about the likely course of protectionism regarding the other two. We maintain that an implicit comparative focus can provide insight into the probable effectiveness of trade actions that U.S. producers initiate in order to achieve import relief. For instance, we shall pay attention to the politics of anti-protection, and in particular to the manner in which coalitions get mustered in response to potential import restrictions within the United States. In this respect, it strikes us that one of the major reasons why the U.S. copper producers came away empty-handed from the 1984 Section 201 process has to do with the effective lobbying done against import relief by domestic users of copper. Although comparisons between unlike commodities will always be inexact, we do maintain that there exist enough points of suggestive similarity among the commodities in our set that we can identify those characteristics within the three sectors that both facilitate and impede the challenge of protectionism.

Our final chapter is an attempt to draw out some of the major implications of our study in the context of the bilateral free-trade accord. It might seem at first glance that the FTA must render redundant and irrelevant (at least for public policy purposes) a study such as ours, for the very good reason that such an agreement is intended to eliminate the sorts of challenges that have, over the past half-decade, occurred in copper, potash, and uranium trade between Canada and the United States. We caution against such a conclusion. At the very least, until a binding dispute-settlement mechanism *and* a harmonization of both countries' countervail and antidumping law are achieved, there will exist the potential for further challenges to Canadian export interests.[29] As for national-security arguments for trade restriction, it is hard to see how they are forbidden by the free-trade accord. Nevertheless, there is the prospect that the *spirit* and not just the letter of the accord will determine the future shape of bilateral trade politics. In this sense, it probably will add a new and salutary dimension to the politics of Canadian-U.S. commodity trade.

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[29] Christopher Waddell and Jennifer Lewington, "Disputes Still Loom Despite Agreement on Free-Trade Pace," *Globe and Mail*, 24 November 1988, p. A1.

2. United States Protectionism in the 1980s

The New Protectionism and the Current International Trading System

Protectionism has existed in a variety of forms throughout modern history because governments have naturally, for any number of reasons, been inclined to favour the protection of domestic industries against foreign competition. Since the start of the 1970s, however, there have been suggestions that a "new protectionism," somehow different from previous forms, has been gathering force. How different and how forceful are matters of interpretation; in this section we will convey what we believe is meant by the term "new protectionism".

At the most general level, "new protectionism" refers to the restriction of trade through the use of a variety of non-tariff barriers. Tariffs and quantitative restrictions were the primary forms of protectionism prior to the 1970s, but the success of the numerous GATT (General Agreement on Tariffs and Trade) rounds in limiting the use of these measures has led governments to seek new ways to protect domestic industries. The new forms of protection include discriminatory administrative procedures, increased use of subsidies, voluntary export restraints, and cartel arrangements. As one student of the phenomenon explains, "the term new protectionism ... refers to an increase in the quantity of protectionism that is currently practised in the international economy as well as to a difference in the form of protectionist measures."[1]

The new protectionism has a number of other important characteristics. To begin with, there is a tendency for the devices employed to be hidden and lacking in transparency. This makes it extremely difficult to measure the amount of trade affected by the new protectionism, as well as for exporting countries to complain about the barriers that they encounter. Secondly, there has been a move away from firm trade laws towards increasing administrative discretion. Rodney Grey expressed it as follows: "An important shift in emphasis has occurred away from reliance on fixed measures or techniques of intervention to regulate the competition between imports and domestic production toward much greater reliance on more flexible methods of

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[1] Melvyn B. Krauss, *The New Protectionism, p. 35.*

protecting the domestic producers."[2] Finally, the new protectionism is associated with the move away from the GATT principle of non-discrimination towards increasing bilateralism and special arrangements. This is due in part to a desire to target trade actions at the most disruptive forces in the market rather than at all exporters.[3]

One of the most noteworthy developments concerning the current trade regime has been the successive GATT rounds, which have reduced tariffs to historically low levels. Whereas in the mid-1930s the average tariff level among the industrialized countries was about 40 percent, today tariffs average only 4 to 8 percent.[4] This trend is even more noticeable when one looks at the United States. In 1931 following the Smoot-Hawley Tariff Act, U.S. tariffs averaged 60 percent; by 1985 the average U.S. tariff level had fallen to 5.5 percent.[5] As tariffs have shrunk, non-tariff barriers have replaced them as the most significant impediments to trade in many countries.

It must be stressed, however, that this reduction in tariffs has not been uniform in all sectors and countries. For example, tariffs remain an important barrier to trade in many developing countries, which have been slow to reduce them because they feel the need for infant industry protection, and because they have not had to offer reciprocal tariff reductions due to the existence of the Generalized System of Preferences.[6] In addition to this, a number of critical sectors, even in developed countries, have kept high tariffs. Examples include the agricultural sector, which has remained outside the auspices of the

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[2] Rodney de C. Grey, "A Note on US Trade Practices," in *Trade Policy in the 1980s*, ed. William R. Cline (Washington: Institute for International Economics, 1983), p. 247.

[3] W.M. Corden, "The Revival of Protectionism," *Group of Thirty Occasional Paper*, no. 14, 1984, p. 1.

[4] Julio J. Nogues, Andrzej Olechowski, and L. Alan Winters, "The Extent of Non-Tariff Barriers to Imports of Industrial Countries," *World Bank Staff Working Papers*, no. 789 (Washington: The World Bank, 1986).

[5] I.M. Destler, *American Trade Politics: System Under Stress* (Washington: Institute for International Economics, 1986), p. 11.

[6] For a discussion of the GSP, see Mark W. Zacher and Jock A. Finlayson, *Managing International Markets: Developing Countries and the Commodity Trade Regime* (New York: Columbia University Press, 1988).

GATT, and the textile and leather footwear sectors.[7]

Another salient feature of the international trading regime, one that has become apparent in recent years, has been the gradual but steady decline in the rate of growth of world trade. For example, between 1948 and 1983 the volume of world trade increased eightfold, with the industrialized countries registering an average annual trade growth of 8 percent in real terms between 1950 and 1975.[8] Whereas in the 1950s and 1960s world trade grew twice as fast as output, by the 1970s it was growing only half again as fast.[9] If growth in world trade was beginning to slow in the 1970s, by 1981 trade was actually declining, and would do so for three years until 1983; moreover, it would take a further two years for trade to regain the levels of the beginning of the decade.[10] The effect of this gradual slowing of world trade was to increase the potential within the system for protectionism. As Harold Malmgren put it, "With a pie that is not growing, a greater share for one can only be achieved by reducing the share of another. Thus, the current conditions are exceptionally favourable for economic nationalism, isolationism and protectionism."[11]

A third important aspect of the current international trading regime has been the growth, both in number and importance, of non-tariff barriers (NTBs). The expansion in the number of non-tariff barriers has been dramatic. Although exact figures on this are hard to arrive at, given the hidden nature of many NTBs, a number of groups have attempted (with varying degrees of success) to monitor their increasing incidence.[12] Julio Nogues, for

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[7] Sir Alex Cairncross, et al., *Protectionism: Threat to International Order* (London: Commonwealth Secretariat, 1982), p. 50.

[8] Bahram Nowzad, "The Rise in Protectionism," *International Monetary Fund Pamphlet Series*, no. 24 (1978), p. 2; Alan V. Deardorff and Robert M. Stern, "Current Issues in Trade Policy: An Overview," in *U.S. Trade Policies in a Changing World Economy* (Cambridge, Mass.: The MIT Press, 1987), p. 17; C. Fred Bergsten and William R. Cline, "Trade Policy in the 1980s: An Overview," in Cline, *Trade Policy*, p. 59.

[9] Harold B. Malmgren, "Threats to the Multilateral System," in Cline, *Trade Policy*, p. 189.

[10] Destler, *American Trade Politics*, p. 169.

[11] Malmgren, "Threats," p. 190.

[12] Attempts at monitoring NTBs have been made by the GATT, the IMF, the USTR, and

example, has found that between 1981 and 1983 there were 2,486 new NTBs imposed by 16 industrialized countries he examined; as well, many of the extant NTBs were being significantly strengthened.[13]

One of the most common forms of these barriers is subsidies. These can take the form of export subsidies, production subsidies, and subsidized loans or loan guarantees; some would also add regional development grants, unemployment assistance, and export targeting to this list. Governments have increasingly come to rely on the use of subsidized trade, as is shown in table 1.[14] Another common form of NTB is discriminatory administrative practices. NTBs of this kind cover a wide variety of practices, but what they all have in common is that they make use of government regulations in order to restrict imports. Trade laws that are biased against imports fall under this heading, as do local-content rules, buy-national programs, and certain health and safety or environmental regulations if they are used in a way to restrict imports. Some of the other main sorts of NTBs include discretionary licensing, customs valuation schemes, variable import levies, minimum price systems, tariff quotas, and discretionary import authorizations.

Table 1

Subsidies as shown in national accounts statistics as a percentage of GDP

Country	1952	1956	1960	1964	1968	1972	1976	1980
Canada	0.41	0.39	0.81	0.85	0.87	0.83	1.73	2.34
United States	0.11	0.20	0.25	0.44	0.50	0.59	0.34	0.43
Japan	0.79	0.26	0.34	0.65	1.11	1.12	1.32	1.32
France	1.71	2.71	1.62	2.03	2.62	1.99	2.68	2.51
Germany	0.65	0.20	0.79	0.99	1.44	1.48	1.49	1.59
Italy	0.89	1.30	1.51	1.23	1.67	2.29	2.60	3.01
United Kingdom	2.68	1.76	1.93	1.56	2.06	1.82	2.78	2.32

Source: OECD, *National Accounts 1951-1980*, volume 1, Main Aggregates, 1982.

UNCTAD. David Greenaway, *International Trade Policy: From Tariffs to the New Protectionism* (New York: St. Martin's Press, 1983), p. 164.

[13] Nogues, "Extent of Non-Tariff Barriers," p. 29.

[14] Gary Clyde Hufbauer, "Subsidies Issues After the Tokyo Round," in Cline, *Trade Policy*, p. 328.

Voluntary export restraints (VERs) deserve special mention because they have become one of the most important kinds of non-tariff barriers. VERs are agreements in which an exporting country "voluntarily" agrees to restrict its exports to another country.[15] VERs are, therefore, administered by the exporting state, although they are usually also monitored by the importing country. The motivation for an exporter to enter into such an agreement is twofold: it prevents the importer from taking more restrictive measures that have been threatened, and it allows the exporter to negotiate as favourable terms of access to the importing market as possible. VERs are also quite popular with importing countries because they involve very little in the way of administrative costs, they are much more flexible than tariffs or quotas (VERs can be easily established, removed, or altered), they are less likely to beget international surveillance, and they can be applied selectively to only those countries that are causing market disturbance.[16]

The amount of trade affected by NTBs has also grown dramatically during the 1970s and 1980s. Estimates of the exact impact of NTBs vary, but one authoritative study has revealed that the amount of trade implicated had risen from only 4 percent of OECD trade in 1974 to 17 percent by 1980.[17] Julio Nogues has found that 18.6 percent of the nonfuel imports of the industrialized countries were subject to NTBs in 1983, and that this involved more than $100 billion worth of trade.[18] The figures for the United States demonstrate an even more dramatic rise in the amount of trade influenced by NTBs for,

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[15] A more precise definition of VERs is supplied by C. Fred Bergsten, "On the Non-Equivalence of Import Quotas and 'Voluntary' Export Restraints," *Towards a New International Economic Order: Selected Papers of C. Fred Bergsten, 1972-1974* (Toronto: Lexington Books, 1975), p. 158: "VERs are limitations on export sales (a) administered by one or more exporting countries or industries (b) on the volume or value of their sales (c) to a single foreign market or several markets, or (rarely) the world as a whole (d) triggered by pressure from the government or industry of the importing country or countries (e) carried out either bilaterally or within a multilateral framework (f) sometimes explicitly authorized or guided by domestic law, and sometimes not."

[16] Alan William Wolff, "The Need for New GATT Rules to Govern Safeguard Actions," in Cline, *Trade Policy*, p. 377.

[17] S.A.B. Page, quoted in Cairncross, *Protectionism*, p. 52.

[18] Nogues, quoted by Alan V. Deardorff and Robert M. Stern, "The Economic Effect of Complete Elimination of Post-Tokyo Round Tariffs," in Cline, *Trade Policy*, p. 27.

as Carol and Bela Balassa show, in the period from 1980 to 1983 the amount of manufactures imported into the United States that were affected by NTBs rose from 20.3 to 35 percent.[19]

These aggregate figures on the impact of non-tariff barriers hide some important sectoral and country differences. Not surprisingly, NTBs have been most common in sectors where the industrialized countries lack competitiveness, such as textile and clothing, leather footwear, steel, automotive, shipbuilding, electronics, and agriculture.[20] In other words, "the growth of the new protectionism is ... essentially a defensive reaction to adjustment pressures."[21] Moreover, NTBs have been deployed against the products of certain countries more than others, with developing country exports being more seriously affected than exports from industrialized countries.[22] Among the developed countries, the hardest hit have been Japan and the NICs, such as Korea, Hong Kong, Taiwan and Singapore.[23] In a sense, the new protectionism might be seen as being directed primarily at the basic manufactured products of Japan and the NICs.

Yet another significant development in the current world trading regime has been the erosion of support, over time, for the GATT. In particular, the principle of non-discrimination has become greatly weakened. This has occurred gradually and in a number of different ways, but the importance of the weakening cannot be overstated. One of the main causes has been the growth of regional free-trade areas or customs unions. The problem here is not that these trading blocs are contrary to GATT rules, but that they allow a state to offer concessions to its regional trading partners that it does not offer to other states. The foremost example of this is the European Economic Community, but the Caribbean Basin Initiative and the recent Canada-U.S.

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[19] Carol and Bela Balassa, "Industrial Protection in the Developed Countries," *World Economy*, June 1984, p. 187.

[20] Jan Tumlir, "The New Protectionism, Cartels, and the International Order," in Ryan C. Amacher, et al., *Challenges to a Liberal International Economic Order* (Washington: American Enterprise Institute for Public Policy Research, 1979), p. 239.

[21] Greenaway, *International Trade Policy*, p. 189.

[22] Nogues, "Extent of Non-Tariff Barriers," p. 49.

[23] Bergsten and Cline, "Trade Policy," p. 70.

Free Trade Agreement can also be cited. The principle of non-discrimination has been further eroded by special arrangements in particular sectors. The best example of this has been the Multi-Fiber Agreement, which has reduced trade in textiles to a series of bilateral arrangements, but the Canada-U.S. Auto Pact might also be cited in this regard. The principle was further attacked, ironically, by the codes on non-tariff barriers reached at the Tokyo Round. These codes apply only to those GATT members who sign them, which in effect means that the signatories can discriminate against the non-signatories.[24] The most significant deviation from non-discrimination, however, has been the acceptance of the Generalized System of Preferences (GSP). The GSP calls on the industrialized world to discriminate in favour of the exports from developing countries. Finally, the application of voluntary export restraints and escape-clause actions can often be blatantly discriminatory.

Another major problem experienced by the GATT has been that states have simply ignored its rules and used other negotiating fora to settle their trade disputes. A number of instances can be cited. For example, there seems to be a widespread disregard for GATT's escape clause, so much so that one writer has suggested that escape-clause actions taken outside of the GATT framework have outnumbered Article 19 actions by well over three to one.[25] This situation exists largely because GATT lacks an effective monitoring mechanism. Not only that, but it has become much more common for states simply to refuse to comply with GATT rulings. The United States, for instance, refused for years to bring its Domestic International Sales Corporations (DISC) into compliance with GATT rules. As well, states have devised various methods to circumvent GATT procedures. Voluntary export restraints and orderly marketing agreements (OMAs) are frequently used as alternatives to GATT procedures. One of the reasons that states resort to such devices is that the GATT dispute-settlement mechanism is much too cumbersome and slow. States fear that by the time a GATT ruling eventually gets made, serious damage will already have been done to a domestic industry. Finally, there is a strong trend toward increased bilateralism in trade and toward the creation of cartel-like arrangements. The Multi-Fiber Agreement has already been mentioned in this regard, and VERs and OMAs have created a similar

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[24] Miriam Camps and William Diebold, Jr., *The New Multilateralism: Can the World Trading System be Saved?* (New York: Council on Foreign Relations, 1983), pp. 50-51.

[25] Wolff, "Need for New GATT Rules," p. 390.

situation in the steel and automotive sectors. Taking all of the above into consideration, it is hard not to agree with Arthur Dunkel, the Director General of the GATT, who warns that the "real danger to the GATT is not that a trade war will break out, but that the major signatories to the GATT will simply pretend that the General Agreement is not there...This would effectively end the GATT."[26]

A further relevant factor in the decline in support for GATT has been the increasing skepticism about its ability to deal effectively with non-tariff barriers. The process involved in reaching the Tokyo Round NTB codes was hard fought and very slow, and there are many who feel that the results were unimpressive.[27] No escape-clause agreement was reached, the subsidies code was weak, the government procurement rules affected only extremely large contracts in certain sectors, and entire sectors such as services, investment, and agriculture were ignored. Attempts were made at the GATT Ministerial Meeting in November 1982 to get another GATT round started to address some of these problems, but the meeting broke up without any agreement being reached. A new GATT round is now underway, but great skepticism remains about its chances of success.[28]

The Appearance of the New Protectionism in U.S. Trade Law and Policy: The Trade Act of 1974

To what extent has the above-mentioned protectionism been in evidence in U.S. trade law and policy since 1970? In this section, we seek to answer this important question by examining the major changes in U.S. trade law and administration that have taken place over the past decade and a half. Our

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[26] Arthur Dunkel, quoted in ibid., p. 363.

[27] For a thorough analysis of the Tokyo Round negotiating process, see Gilbert R. Winham, *International Trade and the Tokyo Round Negotiation* (Princeton: Princeton University Press, 1986).

[28] For a pessimistic assessment of the future of the GATT-centric multilateral trading system, see Michael C. Webb and Mark W. Zacher, "Canadian Export Trade in a Changing International Environment," in *Royal Commission on the Economic Union and Development Prospects for Canada*, vol. 28: *Canada and the International Political/Economic Environment*, ed. Denis Stairs and Gilbert R. Winham (Toronto: University of Toronto Press, 1985), pp. 85-150.

argument is *not* that protectionist forces have been carrying the day in the U.S. political system; rather, we argue that, compared with earlier postwar decades, the 1970s and 1980s have witnessed an upswelling in the calls - usually echoed in, if not emanating from, the Congress - for various forms of import relief on behalf of a succession of battered U.S. industries. Protectionism, whatever this contested term might mean, may not be winning out over liberalism, but it appears to be a more noticeable aspect of U.S. political economy today than in the first three postwar decades.

We begin our analysis with the highly significant Trade Act of 1974, which authorized United States participation in the Tokyo Round of GATT negotiations and also wrought a number of important changes in U.S. trade law. Before getting to the details of this Act, however, we deem it necessary to discuss the political context within which these changes were made. The Kennedy Round of GATT negotiations concluded in 1968 with a number of significant achievements. Tariffs were cut on average by 35 percent, an Antidumping Code was achieved, and the administration agreed to drop the American Selling Price system. The conclusion of the negotiations, however, unleashed pent-up U.S. protectionist forces. The U.S. steel and cement industries were successful in their attempts to get Congress to reject the Antidumping Code, and Congress also refused to eliminate the American Selling Price system.[29] In 1970 pressures for protection in the textile industry mounted, and as a result House Ways and Means Chairman Wilbur Mills proposed a highly restrictive quota bill, which won considerable support and was even endorsed by President Nixon (although it was never enacted). The rise of U.S. protectionist sentiment continued in 1971 and 1972, as can be seen from the considerable support obtained by the Burke-Hartke Bill, a measure that would have reduced U.S. imports of a wide range of products according to a quota set at the 1965-69 level, thus limiting these imports to a fixed share of domestic consumption.[30]

This rise in protectionism following the Kennedy Round was due in large part to the well-founded perception that the trade-remedy laws were not providing adequate relief from imports. The Trade Expansion Act of 1962 had tightened the escape-clause laws to such an extent that, of the 30 cases investigated pursuant to it between 1962 and 1974, only four had resulted in

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[29] Fred Lazar, *The New Protectionism: Non-Tariff Barriers and their Effects on Canada* (Toronto: James Lorimer, 1981), pp. 32-33.

[30] Bergsten and Cline, "Trade Policy," p. 67.

affirmative injury findings.[31] Similarly, although there had been 191 countervailing duty investigations between 1934 and 1968, duties had been applied in only 30 of these cases, and only four duties had been applied in the period since 1960. Relief under the antidumping laws was also difficult to obtain: between 1955 and 1968 there were 371 antidumping cases, but relief was been granted in only 12 of these, with another 89 being concluded either by revision of the price or termination of the sale. Finally, although the Trade Expansion Act of 1962 had created adjustment assistance, the eligibility rules were so strict that no assistance was granted until 1969.[32]

The Trade Act of 1974 made two profound changes in the escape-clause process: it downgraded the degree of causation necessary to prove injury, from a "major cause" of serious injury to a "substantial cause" of serious injury; and it stated that increased imports need not be the result of previous trade concessions.[33] The Act also made OMAs one of the possible remedies available when injury was found, and it forced the President to grant relief when affirmative injury determinations were made unless he felt that it was "not in the United States' national interest" to do so.[34]

A number of major alterations were made in the antidumping laws, the most significant being that dumping was redefined as selling a product below average cost. This meant that dumping could be found even when a product was being sold at the same price in the United States as in the originating country.[35] Another important change was that the Treasury Department would be required to make a tentative ruling within six months of the initiation of a case (nine months in complicated cases), and the United States

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[31] Under the Trade Expansion Act of 1962, escape-clause relief could be provided only if a) there was an absolute increase in imports; b) the increase was in major part the result of trade concessions; and c) imports were demonstrably the principal cause of material injury. Lazar, *New Protectionism*, pp. 37-38.

[32] Destler, *American Trade Politics*, p. 113.

[33] A "substantial cause" of injury was defined as a "cause which is important and not less than any other cause." Robert Baldwin, *The Political Economy of U.S. Import Policy* (Cambridge, Mass.: The MIT Press, 1985), p. 106.

[34] Bela Balassa, "The New Protectionism: An Evaluation and Proposals for Reform," in Amacher, *Challenges*, p. 282; Wolff, "Need for New GATT Rules," p. 368.

[35] Bergsten and Cline, "Trade Policy," p. 69.

International Trade Commission (ITC) would have to make an injury determination within three months.[36] The Act also gave petitioners the right to appeal Treasury Department decisions to the U.S. Customs Court.

Nor did the countervailing duty laws remain unaltered. The biggest of the changes in this respect was the requirement that the Treasury Department make a final determination within a year of the filing of a petition. This shift, similar to that affecting the antidumping laws, was made in response to criticisms from the business community that investigations often dragged on for so long that it was not possible to obtain meaningful relief. Another relevant innovation was the making of countervailing duties applicable to duty-free imports, including those entering under the Generalized System of Preferences.[37]

Finally, the Act also permitted the U.S. courts to review a Treasury Department decision to reject the imposition of countervailing duties. The greatest impact of the Trade Act of 1974 was felt in the laws dealing with unfair trade practices. One of the most important areas was in the definition of what would constitute an unfair trade practice. The 1962 injunction against "unreasonable and unjustifiable" import restrictions was expanded to include "subsidies on (foreign) exports which have the effect of substantially reducing sales of the competitive United States product."[38] In addition, the variety of remedies available was expanded to include cease-and-desist orders that could be modified or revoked at any time. ITC was given the sole responsibility for determining injury in unfair trade practice cases, with the Act stating that the President could reject an affirmative injury determination only on policy grounds.

The Trade Act of 1974 also significantly weakened the eligibility requirements for adjustment assistance. The old requirement that imports be a "major cause" of unemployment in an industry was replaced by a clause stating that imports need only have "contributed importantly" to unemployment, and need not have been the largest factor in this regard.[39] The Act also increased the magnitude and duration of adjustment assistance.

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[36] Lazar, *New Protectionism*, p. 33.

[37] Balassa, "New Protectionism," p. 282.

[38] Quoted in Destler, *American Trade Politics, p. 117.*

[39] Baldwin, *U.S. Import Policy,* p. 57.

In addition to these changes in U.S. trade law, the Trade Act of 1974 also granted the President negotiating authority for the Tokyo Round. Admittedly, President Nixon did not receive the unfettered right that he had sought to cut tariffs and to enter into codes on non-tariff barriers, but he did get Congress to agree that the final results of the Round would be voted on without amendments within 90 days. He was given the authority to cut tariffs of over 5 percent by up to 60 percent, and tariffs of less than 5 percent completely; as well, a detailed approval procedure was worked out for approving codes dealing with non-tariff barriers.

The Trade Agreements Act of 1979

To understand the Trade Agreements Act of 1979, one must be aware of the forces that shaped it. The Act was created to implement the results of the Tokyo Round and to correct some of the problems that had arisen following the passage of the Trade Act of 1974. The Tokyo Round was successful both in reducing tariffs and in achieving agreement on a number of codes on non-tariff barriers. During the often difficult negotiations, the United States made two major concessions: it agreed to an injury test in countervailing duty cases, and it dropped the American Selling Price system. The United States was also criticized by its trading partners for using its trade-remedy laws as a barrier to trade by dragging out investigations excessively.

The other major force influencing the Trade Agreements Act of 1979 was the perception of domestic interests that the country's trade laws were still not providing adequate protection from imports, in spite of the changes made through the 1974 Act. Although the number of trade actions filed had risen noticeably, the amount of protection granted was not appreciably greater. This was particularly the case with countervailing-duty investigations, largely due to the fact that in 1974 the Treasury Secretary had won the right to waive countervailing duties for a four-year period while the Tokyo Round negotiations were underway.[40] Thus in the period from 1976 to 1978, 19 of the 35 affirmative injury findings in countervailing duty cases were waived. Similarly, although the number of Section 301 cases (unfair trade practices) rose dramatically after 1974, the negotiations following affirmative findings often proved slow and difficult. The effect of this was that none of the 18 affirmative

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[40] Lazar, *New Protectionism*, p. 30.

injury findings in Section 301 cases between January 1975 and July 1979 resulted in the imposition of any type of countermeasure.[41]

The Trade Agreements Act of 1979 made many significant alterations in U.S. trade law, but two areas were left untouched. The escape-clause laws were not changed, because it had not been possible to reach agreement on a safeguards code at the Tokyo Round; and the adjustment-assistance program remained the same.

The area of U.S. trade law that underwent the greatest overhauling as a result of the Trade Agreements Act of 1979 was countervailing duties (CVDs). Here the most important development was the U.S. acceptance, reluctant to be sure, of a material injury test in countervailing duty cases, with "material injury" being defined as "harm which is not inconsequential, immaterial or unimportant."[42] Henceforth, countervailing-duty cases would also have to adhere to stricter investigatory timetables. An investigation would have to begin within 20 days of the receipt of a petition, and only "clearly frivolous" petitions could be dismissed without investigation. A preliminary ruling would have to be made within three months and, if it was positive, the importer would have to post a deposit. Final rulings would normally have to be made within seven months rather than a year.[43] (Similar timetables were also established for antidumping cases.) Another change, one affecting both the countervailing duty and antidumping laws, was that responsibility for determining the "fairness" of trade would be shifted from the Treasury Department to the Commerce Department, in large measure as a result of a perception that Treasury had been overly "soft" on foreigners.

Some other revisions in the countervailing duty laws were made. One important one was that if the six ITC commissioners split evenly on a CVD injury ruling, then it would be deemed that there had been injury. In other words, to prove injury only three votes were needed, but to reject injury took four votes. In addition to this, although the United States agreed to the Tokyo Round Subsidies and Countervailing Duty Code, the illustrative list of what constituted a subsidy was much longer in the U.S. law than had been generally agreed. Furthermore, a number of procedural changes were established to make CVD and antidumping investigations more open and fair.

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[41] Destler, *American Trade Politics*, p. 120.

[42] Baldwin, *U.S. Import Policy*, p. 76.

[43] Destler, *American Trade Politics*, p. 122.

Finally, all of these changes to the countervailing duty laws would apply only to those countries that had signed the GATT Subsidies Code or equivalent obligations.[44]

With regard to dumping, the 1979 Trade Agreements Act amended the 1930 Tariff Act, by specifying the conditions for the imposition of dumping duties, and technically abolished the 1921 Antidumping Act. However, with the exceptions noted above, the 1979 Act was a virtual duplicate of the 1921 Act, as we shall explain in the next chapter. It is worth noting here that the antidumping code reached at the Tokyo Round was actually weaker than the one agreed to at the Kennedy Round because it accepted the U.S. definition of dumping as "material injury by reason of dumped goods" instead of the clause that "dumped goods must be demonstrably the principal cause of material injury."[45]

A few minor alterations were made in the unfair trade-practices laws through the Trade Agreements Act of 1979, but a much more important development had taken place administratively within the ITC. Starting in 1974 (but especially since 1976) this quasi-judicial agency began interpreting its mandate in unfair trade practice cases more broadly. This brought ITC into conflict with other federal agencies, upon whose jurisdiction its investigations began to encroach, and resulted in more affirmative injury findings as well as in more filings. Between 1962 and 1974 the ITC had ruled on only 26 cases, but in the next four years it handled 37.[46] The only changes made to the unfair-trade-practices laws in 1979 were the addition of services to the list of products covered by the legislation, and the amending of Section 337 of the Trade Act of 1974 so as to reduce the overlap with Sections 303, 701, and 731.

Finally, we should note briefly how the Trade Agreements Act of 1979 was constructed. Unlike 1974, the President this time did not submit a bill to Congress for approval; instead, joint drafting sessions were held between Congressional and Executive agencies both before and after the final deal had been arranged. Significantly, this act greatly increased the presence of Congress in United States policy.

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[44] Baldwin, *U.S. Import Policy*, p. 77; Lazar, *New Protectionism*, p. 30.

[45] Ibid., p. 34.

[46] Baldwin, *U.S. Import Policy*, p. 86.

The Trade and Tariff Act of 1984

U.S. protectionism continued to grow after the passage of the Trade Agreements Act of 1979, but for different reasons than before. The 1974 and 1979 Trade Acts had succeeded in making it easier to obtain relief from imports, and consequently the number of filings and affirmative injury findings had risen greatly. The power of the President to reject an affirmative finding and withhold relief still meant that there was less protection than there might have been, but it was clear that more relief was being granted than heretofore. By 1983, for example, there were 56 countervailing duties in effect compared to 13 in 1968, and in September 1983 there were 137 antidumping duties extant.[47] In other words, the pressure for protectionism after 1979 did not arise simply out of frustration with the inadequacies of the trade-remedy laws (although this was still an important factor); larger, macroeconomic factors were also pushing Americans towards increased protectionism.

A variety of factors converged in the early 1980s to make the pressure for protectionism acute in the United States. The world economy fell into recession in 1982 and 1983, which resulted in post-war highs in unemployment in the United States. The dollar became greatly overvalued, a development that was both cause and consequence of the twin deficits, budgetary and trade. The GATT Ministerial Meeting in November 1982 was unsuccessful in getting another round of multilateral trade negotiations started, and the number and severity of trade irritants between the United States and its trading partners grew. By 1984 the U.S. economy started climbing out of recession, but in the process many important U.S. industries remained in severe difficulty. Thus, the Trade and Tariff Act of 1984 was passed at a time when U.S. trade policy was under great strain.

This legislation can be best described as a series of unrelated protectionist trade measures. Unlike earlier trade acts, the Trade and Tariff Act of 1984 was not a comprehensive legislative proposal submitted for approval by the President; instead, it was a collection of ideas put forward by members of the Congress, as well as the Executive.

It introduced a number of interesting features into U.S. trade law. One of the most significant gave Congress the right to pass a joint resolution implementing an ITC import-relief recommendation when the President had decided against granting relief. The President could veto the resolution, but

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[47] Destler, *American Trade Politics*, p. 125.

a two-thirds vote in both houses of Congress would override this veto. A second important provision authorized the President to enter into negotiations to reduce trade barriers in services and trade-related investments. To pressure the administration to do this, the Act called on the United States Trade Representative (USTR) to produce an annual report to Congress detailing foreign trade barriers in these areas and specifying what the administration was doing about them.[48] Similar provisions authorized the President to undertake market access and intellectual property-right negotiations with the newly industrializing countries. Finally, the Trade and Tariff Act of 1984 extended the Generalized System of Preferences and amended the trade-remedy laws to take into account the cumulative effects of import penetration.[49]

The Act also made a number of sector-specific changes, the most significant of which were in the steel industry, where a global import quota of between 17 and 20.2 percent of the U.S. steel market was established. Additionally, the U.S. wine industry was given the right to challenge any wine imports into the country.[50]

The Omnibus Trade Bill

The pressure on U.S. trade policy did not subside after the passage of the Trade and Tariff Act of 1984; on the contrary, the pressure for protectionism mounted with renewed vigour. A variety of reasons account for this, but the most noteworthy was that the U.S. trade deficit kept growing, by 1986 soaring to more than $150 billion. The magnitude of this deficit awakened politicians to the importance of trade policy, and soon there were literally hundreds of bills dealing with this issue. In 1985, for example, some 634 trade bills were put forward in Congress, of which 99 were seriously protectionist, and another

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[48] Baldwin, *U.S. Import Policy*, pp. 36-38.

[49] The statutory structure of the U.S. GSP program is described in Bart S. Fisher and Frank R. Samolis, "Trade Preferences for Developing Countries," Book 8, *Law & Practice of United States Regulation of International Trade*, ed. and comp. Charles R. Johnston, Jr. (New York: Oceana Publications, June 1987).

[50] Destler, *American Trade Politics*, p. 82.

77 would have made it easier to obtain import relief.[51] There was talk of an across-the-board import surcharge to correct the trade deficit, and a highly protectionist textiles bill fell only eight votes short in 1986 of having President Reagan's veto overturned. The Group of Five (representing the United States, United Kingdom, France, West Germany and Japan) attempted in September 1985 to correct the overvaluation of the dollar, which was contributing greatly to the size of the trade deficit, but as this measure was incapable of reducing the deficit in the short term, the pressure for protection continued to grow. In the spring and summer of 1986 these divergent protectionist actions coalesced into a single legislative proposal, the Omnibus Trade Bill.[52]

The Omnibus Trade Bill passed by the House of Representatives in May 1986 would have changed U.S. trade law in a decidedly more protectionist direction. It would have broadened the definition of dumping to include export targeting and diversionary dumping, and its natural-resource provisions would have made it actionable for a government to sell a resource input to a domestic industry at less than market value. The bill would also have transferred the President's ultimate authority in Section 201 and 301 cases to the USTR, and made it mandatory for the President to impose relief when Section 301 had been violated. Section 201 was amended to allow for emergency relief for producers of perishable products, and Section 337 was changed to eliminate the need to prove injury when intellectual property rights had been violated. Furthermore, the bill contained provisions that would have opened markets for U.S. telecommunications products, and the Gephardt Amendment would have mandated negotiations and then sanctions against major trading partners who maintained "excessive trade surpluses" with the United States.

The Omnibus Trade Bill of 1986 never became law. President Reagan denounced it as "pure protectionism" and "rankly political," and vowed to veto it. In the end, the bill died without being vetoed when the 99th Congress came to an end. A new trade bill - the Omnibus Trade and Competitiveness Act - did make it through Congress and was signed into law in 1988. It was similar in some ways to the previous one; for example, it contained provisions that limited Presidential discretion in some trade investigations, and also laid heavy emphasis on U.S. export promotion. However, it is considered to be

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[51] Ibid., p. 85.

[52] Anna Cifelli Isgro, "Get Ready for the Trade Act of 1987," *Fortune*, 2 March 1987, pp. 83-84.

much less protectionist than the 1986 bill. Nevertheless, it is not free-trade-oriented; one trade analyst has remarked that it has "finally brought the United States with full force into the mercantilist world."[53]

The New Protectionism of U.S. Trade Policy

Modifications in U.S. trade law over the past decade have suggested the United States is moving in a protectionist direction. Changes in the country's trade policy have indicated the same trend. In this section, we survey a few selected cases to see how trade pressures have been handled by the President, the USTR, and the ITC. Given the limited number of cases examined here, the results must be considered tentative, and not necessarily constituting evidence of a clear pattern of emergent protectionism.

In the early and mid-1970s the U.S. leather footwear industry was in considerable difficulty. Production of leather footwear had fallen every year from 1970 to 1974, and the number of workers had decreased by 17 percent while import penetration levels had risen from 21 to 27 percent. Furthermore, in the period from 1974 to 1976 non-rubber footwear imports from Korea and Taiwan had increased by 40 percent.[54] In response to these pressures, the U.S. industry launched an escape-clause action in 1976, resulting in an ITC determination in February 1977 that these non-rubber footwear imports had caused serious injury. That April President Carter decided to work out orderly marketing agreements with Korea and Taiwan rather than impose quotas. The OMAs that were reached lasted four years, and the United States notified GATT that these had been invoked in accordance with the GATT safeguards provisions. The outcome in this instance was orderly in that it did not cause much disturbance of the market, but the OMAs were clearly discriminatory since they applied only to Korea and Taiwan.

A similar case occurred in 1977 in the colour television manufacturing industry. In 1976 there was a sudden surge in imports to the United States from Japan. During the first five years of the decade, U.S. colour television imports from Japan had averaged 1.1 million sets a year, but in 1976 imports

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[53] Clyde H. Farnsworth, "U.S. Push on Exports Sets Up a New Battle of the Barriers," *New York Times*, 7 August 1988, p. 4:1.

[54] Nowzad, "Rise in Protectionism," pp. 25-26.

nearly tripled, soaring to 2.9 million sets.[55] The U.S. industry filed an escape-clause case, and early in 1977 the ITC found that it had been seriously injured by imports. President Carter rejected the ITC's call for global restrictions on colour television imports, instead negotiating an OMA with Japan. Although the arrangement was as discriminatory as that for non-rubber footwear, it did not result in the same degree of order in the marketplace. Trade diversion took place to countries such as Canada, Mexico, Taiwan, and Korea; and Japanese companies felt the need to invest in U.S. facilities. Eventually, OMAs were also arranged with Korea and Taiwan.

Especially noteworthy about the colour television case was that the U.S. industry used more than one avenue to secure protection. In addition to its successful escape-clause case, it also resorted (unsuccessfully) to the anti-dumping, countervailing duty, unfair trade-practice, and antitrust laws. This type of multiple harassment of foreign imports has become increasingly common and effective.

A third indicator of a potentially protectionist trend in U.S. trade policy materialized in 1980. At that time the U.S. automotive industry was in difficulty because the second oil shock had made smaller, more fuel-efficient cars more attractive, something Detroit simply had not anticipated. As a result, domestic sales of U.S. vehicles declined from 9.3 million in 1978 to 6.6 million in 1980; the market share of imports, by contrast, increased from 17.7 to 26.7 percent.[56] In June 1980 the Ford Motor Company and the United Auto Workers filed an escape-clause petition. In November the ITC decided by a three-to-two margin that, although the industry was clearly in trouble, its problems were due more to changing consumer preferences and the recession than to imports. In spite of this finding, the Reagan administration proceeded to negotiate a voluntary export-restraint agreement with Japan. In other words, pressure for import relief had become so intense that it was now possible for protection to be granted even in the face of a *negative* injury determination.

United States trade policy in the textile industry seems also to have become progressively more restrictive over time. Unlike with the three examples above, this has not been achieved through the application of trade law, but rather by the progressive tightening of the Multi-Fiber Agreement (MFA).

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[55] Wolff, "Need for New GATT Rules," p. 371.

[56] Destler, *American Trade Politics*, p. 70.

The Multi-Fiber Agreement was created in 1973 under the auspices of the GATT to monitor and regulate trade in the textile sector. Technically a multilateral arrangement involving both developed and developing nations, in practice it has become merely a framework within which states make bilateral deals with each other. The MFA provides for six percent annual growth in exports for producing countries, but importing countries have rarely allowed for anything approaching this much growth.

The United States has used the Multi-Fiber Agreement to hamper foreign access to the domestic market; in this, of course, it has hardly been alone. In 1977, it renewed the MFA for another four years, using the occasion to reach new bilateral accords with its largest suppliers among the developing countries: Hong Kong, Korea, and Taiwan. The quotas for these countries were frozen at their 1977 level for a year, and were allowed only to expand very slowly thereafter.[57] Washington also employed the 1977 renewal to increase the product coverage in these bilateral arrangements so that the quota system could not be circumvented by closely related products. The 1981 renewal followed a similar pattern, and in some cases the bilateral pacts called for reductions in quotas. Another practice adopted by Washington has been to cut for subsequent years the quota of a country that does not fill its current-year quota. By the end of 1982, bilateral agreements had been reached with 22 countries under the terms of the MFA, affecting more than 85 percent of U.S. textile imports.[58]

U.S. trade policy has been especially active in responding to the desires of the domestic steel industry.[59] In 1977 the United States established the Trigger Price Mechanism for steel. Under this system, the Treasury Department would set trigger prices for a wide range of steel products based on the production costs of the world's most efficient steelmakers, the Japanese. Whenever steel was imported at prices below the trigger point, an antidumping investigation would automatically be launched. The Trigger Price Mechanism was suspended in early 1980, renewed with a new surge-control provision in September 1980, and suspended again in 1982. The policy became even more protectionist in 1982 in response to industry's filing of 150

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[57] Balassa, "New Protectionism," p. 281.

[58] Cairncross, *Protectionism*, p. 281.

[59] But for a dissenting view, cf. Michael K. Hawes, "The Steel Industry: Change and Challenge," *International Journal* 42 (Winter 1986/87): 25-58.

antidumping and countervailing-duty petitions.[60] The number of filings overwhelmed the trade administration system and forced a political solution, one that saw the Europeans acquiescing in a voluntary restraint agreement limiting their share of the U.S. steel market to 5.5 percent.[61]

Continued pressure from the steel industry finally succeeded in 1984 in achieving comprehensive protection. The event that stimulated this was an ITC escape-clause determination that the domestic industry had been injured, accompanied by a recommendation that tariffs and quotas be applied as a remedy. President Reagan rejected the recommendation, but did state that he favoured the idea of returning the market to its "normal level of steel imports," which he defined as 18 percent of the U.S. market. The Trade and Tariff Act of 1984 legislated a target of between 17 and 20.2 percent, and a series of bilateral VERs were negotiated to put this into effect. In other words, over a period of seven years U.S. trade policy in the area of steel moved from creating a quasi-protectionist trigger-price mechanism, to quotas on selected importers, and finally to comprehensive protection.

Recent Trends in U.S. Trade Policy

Another method of gauging the extent of a postulated new protectionism in the United States would be to examine some of the trade policy trends of the past decade. One of the most prominent has been a less-than-rigorous adherence to GATT rules. The most striking instance of this occurred in 1976 when the United States ignored a GATT ruling that its Domestic International Sales Corporations (DISC) legislation constituted an export subsidy. Under this program U.S. exporters have a number of advantageous tax deferrals on export profits from international sales corporations. The United States did eventually slightly modify the DISC program in 1982, to bring it into compliance with GATT rules, but the years of defying the rules clearly showed the United States to have been in contravention of GATT. As in the case of the MFA, however, the United States was only one of the many countries bending if not contravening GATT rules and norms.

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[60] Destler, *American Trade Politics*, p. 128.

[61] I.M. Destler and John S. Odell, *Anti-Protection: Changing Forces in United States Trade Politics*, (Washington: Institute for International Economics, 1987), p. 15.

A number of other less direct examples can be adduced. As noted earlier, Washington refused to implement the Antidumping Code and to eliminate the American Selling Price System following the Kennedy Round, and it was not until 1979 that the United States brought its countervailing duty laws into compliance with GATT by adding an injury test. Similarly, the U.S. escape-clause laws have not complied with GATT rules since 1974 when the United States dropped the requirement that increases in imports must have been caused by previous trade concessions. Furthermore, the U.S. unfair-trade-practice laws have never had a GATT counterpart, and the Subsidies Code that Washington implemented in 1979 included provisions not found in the GATT code (e.g., the U.S. code includes the subsidies of subnational governments, whereas GATT only covers national subsidies). A final example is that the United States has made its acceptance of certain GATT codes conditional on various demands being met; the U.S. renewal of the Generalized System of Preferences in 1974 and 1984 followed this pattern, as did U.S. acceptance of the GATT Subsidies Code.[62]

A discernible trend of late in U.S. trade policy has been a renewed interest in the concept of reciprocity. This concept has been one of the cornerstones of U.S. trade policy for more than a century, but the new reciprocity movement defines the term somewhat differently than was the case in the past. William R. Cline explains the difference as follows: [63]

> In the more traditional conception of the term, reciprocity has meant a broad balance between the reduction of trade barriers offered by the United States and the liberalization secured from other major trading partners in negotiations, or reciprocity "at the margin" on a basis of all products considered together ... The new reciprocity movement focuses instead on reciprocity of the resulting outcome, and tends to base

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[62] In 1974 the United States stated that it would not extend GSP benefits to developing countries that provided preferential access to their market to other developed nations. John H. Jackson, "Multilateral and Bilateral Negotiating Approaches for the Conduct of U.S. Trade Policies," in *U.S. Trade Policy in a Changing World Economy*, ed. Robert M. Stern (Cambridge, Mass.: The MIT Press, 1987), p. 381. The 1984 renewal was made conditional on a country's respecting intellectual property rights and observing "fair labour standards". Alan V. Deardorff and Robert M. Stern, "Current Issues in Trade Policy: An Overview", in Robert M. Stern, "U.S. Trade Policies", p. 304.

[63] William R. Cline, *Reciprocity: A New Approach to World Trade Policy?* (Washington: Institute for International Economics, September 1982), pp. 7-8.

judgements on sectoral grounds rather than recognize an overall balance. It also tends to seek bilateral reciprocity of trade outcome, focusing on countries that have a bilateral surplus with the United States while not taking into account US bilateral surpluses with other areas.

This new interpretation of reciprocity is premised on the assumption that U.S. markets are substantially more open to foreign products than are foreign markets, and that pressure from the United States to open these markets will not bring on foreign retaliation. The reciprocity movement has a strong sectoral emphasis and has focused mainly on the services, high-technology, telecommunications, and agricultural sectors.

This new interpretation of reciprocity has gained much support within Congress and even the Administration, and hence there has been a set of trade bills advocating an aggressive reciprocity; in 1982 alone, there were 60 such bills.[64] So far, none of these bills has been enacted, but a number have gained considerable support. The best example was a bill sponsored by Senator John Danforth in 1982, who called on the President to investigate foreign trade practices that "deny to the United States commercial opportunities substantially equivalent to those offered by the United States" and to "propose such actions as may be necessary to redress any imbalances." If this type of threat failed to halt the unfair trade practice, the bill called for the threat to be implemented. A similar bill sponsored by Senator John Heinz also won considerable support in 1982. Reciprocity proposals have found their way into, *inter alia*, the Services Industries Commerce Development Bill in 1983, Senator Gary Hart's High Technology Trade Bill of 1983, the Omnibus Trade Bill, and the 1988 trade legislation. Noteworthy in respect of this latest legislation have been the calls for the USTR to exercise the leverage contained in the reciprocity-inducing "super 301" process.[65]

Another recent development has been the increased use of bilateralism, something that reflects the U.S. frustration with the GATT and with multilateralism generally. It is based on the idea that U.S. interests can be advanced more effectively bilaterally, and examples are not difficult to find.

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[64] Jock A. Finlayson, "Canada, Congress and U.S. Foreign Economic Policy," in *Royal Commission on the Economic Union and Development Prospects for Canada;* vol. 29: *The Politics of Canada's Economic Relationship with the United States,* ed. Denis Stairs and Gilbert R. Winham (Toronto: University of Toronto Press, 1985), p. 153.

[65] "Talking Loudly and Carrying a Crowbar," *The Economist*, 29 April 1989, pp. 23-24.

We have already noted the widespread use of voluntary export restraints and orderly marketing agreements; more obvious examples include the bilateral free-trade agreements the United States has struck. Washington reached a bilateral free-trade accord with Israel in 1985 and, of course, with Canada in 1987. The Caribbean Basin Initiative (though not a bilateral endeavour as such) has extended duty-free access to the U.S. market for all but a few key Caribbean products.

Explaining the Rise of the New Protectionism

I: Macroeconomic Causes

It is one thing to recount, as we have done so far in this chapter, developments that arguably are evidence of a growing U.S. trade protectionism. It is quite another thing, however, to explain protectionism. In the following pages we shall summarize the main explanations that have been advanced, and attempt to weigh their significance. For the purpose of simplicity, these will be grouped under two main headings: macroeconomic explanations, and political ones. In our concluding paragraphs, we shall survey some additional systemic considerations. We begin with macroeconomic sources of protectionism.

No single macroeconomic factor can be isolated in explaining the rise of the new protectionism in the United States; rather, there are a number of interrelated factors that collectively account for this phenomenon. These factors we analyze separately, although we think it important to stress their interrelatedness. Perhaps the most direct explanation has been the soaring U.S. trade deficits of the 1980s. The United States experienced continuous trade surpluses from 1894 to 1970. Since 1970, however, deficits have become the norm,[66] and they became worrisome in the late 1970s, when the deficit hit $30 billion a year.[67] Even then the United States continued to enjoy a surplus in *manufactured* goods, although a hefty oil-import bill caused the

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[66] Destler, *American Trade Politics*, p. 44.

[67] Arthur F. Burns, "The American Trade Deficit in Perspective," *Foreign Affairs* 62 (Summer 1984): 1058.

merchandise-trade account to slip into deficit.[68] The trade deficit - including manufactured goods - was growing at alarming rates by the mid-1980s, reflecting both a stagnation in exports and a surge in imports. Total U.S. exports fell slightly in the period from 1980 to 1985 from $224.3 billion to $214.4 billion, whereas imports shot up in the same period from $249.8 to $338.9 billion.[69]

The importance of the trade deficit as a generator of protectionism cannot be overstated, for its sheer enormity has alerted the U.S. public and politicians to the importance of trade policy, fostering a climate within which protectionist sentiment could not help but flourish. The trade deficit has now become a barometer of U.S. economic prowess in the minds of many Americans, with implications extending far beyond the sphere of political economy.[70] Until it falls to a politically acceptable (if necessarily imprecise) level, the pressure for protectionism can be expected to remain strong.

What accounts for this trade deficit? In part, the answer lies in the fact that the U.S. economy has become significantly more integrated into the world economy. The most dramatic evidence of this can be seen in the figures for exports and imports as a share of GNP at the beginning of each of the past four decades. Exports as a percentage share of GNP were 6.3 in 1950, 7.7 in 1960, 9.2 in 1970, and 19.7 in 1980. The comparable percentage shares for imports were even more dramatic: 5.6, 5.8, 8.7, and 21.7.[71] In other words, the importance of trade has more than doubled since the start of the 1970s. Further evidence of the internationalization of the U.S. economy can be gleaned from figures showing that 40 percent of farmland is now devoted to exports, that one-sixth of all jobs in manufacturing are tied to exports, that between 25 and 33 percent of the profits of U.S. corporations come from their international activities, and that imports account for more than half of U.S.

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[68] Peter G. Peterson, "The Morning After," *Atlantic Monthly*, October 1987, p. 43.

[69] Destler, *American Trade Politics*, pp. 82, 170.

[70] For a penetrating look at the security implications of a declining U.S. economy, see David P. Calleo, *Beyond American Hegemony: The Future of the Western Alliance*, (New York: Basic Books, 1987). Also see Felix Rohatyn, "Restoring American Independence," *New York Review of Books*, 18 February 1988, pp. 8-10.

[71] Destler, *American Trade Politics*, pp. 40-41.

needs in 24 of the 42 most critical primary products.[72] The importance of these figures derives from the fact that U.S. goods are now facing increasingly strong competition from imports; according to one estimate, 70 percent of all U.S. goods production now face foreign competition.[73] Thus, the potential for protectionism has grown because the number of industries affected by foreign trade has increased at the same time that international competition has become fiercer and macroeconomic forces have put pressure on the U.S. economy.

A dramatic stimulus to protectionism was supplied by the overvalued U.S. dollar during the first half of the 1980s. Between 1980 and February 1985, the trade-weighted dollar rose by an incredible 70.2 percent, reaching a level that put the dollar 40 percent above the value where U.S. products could be deemed broadly competitive.[74] The cause of this inheres chiefly in the U.S. budget deficit, which has necessitated high domestic interest rates that in turn have attracted large capital inflows and driven up the currency's value. There were other factors to consider as well. For instance, as the dollar was rising in value during the early Reagan administration, no attempt was made by the White House to intervene in international currency markets to stabilize its value. The West Germans and the Japanese did intervene, but their efforts proved ineffective without complementary U.S. actions.[75] Moreover, the nervousness of many investors regarding the LDC debt crisis, coupled with the obvious pro-business orientation of the new Reagan administration, made the dollar seem a safe haven indeed for investment at the start of the 1980s.

The overvaluation of the dollar had powerful effects that contributed greatly to the rise of protectionism with the United States. U.S. exports became overpriced and uncompetitive, and imports became cheaper and more attractive. In addition, competition from imports reduced domestic investment, and the return on foreign investments fell. Coupled with this is what some economists see as a link between the overvalued dollar and the

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[72] C. Fred Bergsten, *The United States in the World Economy: Selected Papers of C. Fred Bergsten, 1981-1982* (Toronto: Lexington Books, 1983), p. 18.

[73] Ira Magaziner and Robert Reich, quoted in Lawrence A. Fox and Stephen Cooney, "Protectionism Returns," *Foreign Affairs* (Winter 1983/84): p. 77.

[74] Destler, *American Trade Politics*, p. 52.

[75] Bergsten, *Selected Papers*, p. 87.

growth of unemployment: Deardorff and Stern, for example, suggest that for every percentage point drop in U.S. price-competitiveness, the trade deficit rises by $3 billion and 70,000 people become unemployed.[76] Together, these factors can be seen to have contributed to the rise in protectionism by increasing the trade deficit and, with it, the pressure on import-competing industries.

There is another consideration to bear in mind when discussing the rise in protectionism resulting from the overvalued dollar: the "ratchet effect." This holds that whenever a currency becomes overvalued for a prolonged period there will be an increase in the level of protectionism; however, when the currency returns to equilibrium or becomes undervalued, the protectionism does not disappear. Instead, the level of protectionism "ratchets" upwards every time a currency gets overvalued.[77]

The importance of the overvalued dollar in the rise of U.S. protectionism is suggested when one seeks to explain why the trade deficit would not immediately improve once the dollar began to fall. The reason can be found in an economic concept called the J-curve, which is associated with the argument that over the short term (18 months to two years) the effect of a devaluation will be to worsen a trade imbalance.[78] The J-curve, although not actually "keeping" the U.S. trade deficit higher than it otherwise would have been after the dollar began to fall in September 1985, might nevertheless be said to have made an indirect contribution to the rise in protectionism.

A macroeconomic factor that deserves to be singled out for discussion in this context is high interest rates. The United States has been forced to raise interest rates in order to restrain inflation and finance its $200 billion budgetary deficit. The effect of this rise has been accentuated by Japanese economic policies. In the 1980s Japan has been following a reverse economic policy mix from that of the United States, one characterized by tight fiscal but loose monetary policy, and low interest rates. This resulted in a wider-than-normal differential between the two countries' interest rates; hence capital flowed into the United States faster than it otherwise might have.

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[76] Deardorff and Stern, "Economic Effect," pp. 101, 109.

[77] C. Fred Bergsten and William Williamson, "Exchange Rates and Trade Policy," in Cline, *Trade Policy*, p. 102.

[78] Bergsten, *Selected Papers*, p. 82.

High U.S. interest rates contributed to the rise of protectionism in two main ways. First, they made it very attractive for international investors and currency traders to purchase dollar-denominated assets. With the U.S. economy drawing in foreign capital, the dollar's value was forced upward, in turn increasing the pressure for protectionism. Secondly, the rise in interest rates increased the debt-servicing costs of those countries that owed money to U.S. banks. This meant that many heavily indebted Third World countries, particularly those in Latin America, were forced to restrict imports severely to prevent a worsening of their balance of payments. In 1982, for example, Mexico, Chile, and Argentina all halved their imports, and the LDCs as a whole cut their trade deficits by $14 billion.[79] The effect of this on U.S. exports to Latin America was disastrous: in only two years (1981 to 1983) the U.S. trade balance with Latin America shifted from a $7.5 billion surplus to a $14 billion deficit.[80] Thus, high interest rates contributed to making it more difficult for the United States to export to the heavily indebted Latin American countries.

Parenthetically, interest rates have also contributed to the rise in U.S. protectionism in the period during which the dollar began to *fall*. The reason for this is that falling interest rates and the huge budget deficit encouraged domestic consumption and thus the demand for imports, which normally should have fallen along with the dollar.[81]

No analysis of the rise of protectionism in the United States can overlook the increasingly strong international competition facing U.S. companies in a range of products. This competitive problem is not unique to the United States, but rather is part of a widespread change that has been occurring in the international trading system. In the 1960s and 1970s Japan and the NICs experienced spectacular growth in their manufacturing sectors, combined with an even more rapid growth in their share of world trade. Collectively, the NICs' share of world trade grew from 6 percent in 1970 to 11.4 percent in 1983, with South Korea, for example, experiencing 28.8 percent annual growth

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[79] Susan Strange, "Protectionism and World Politics," *International Organization* (Spring 1985): 233-59.

[80] Jeffrey Garten, "Gunboat Economics," *Foreign Affairs* (1984): p. 545.

[81] Robert Kuttner, "Dollar May Have to Fall Further to Help U.S. Trade Deficit," *Globe and Mail*, 20 January 1988, p. B11.

of exports from 1960 to 1977.[82] The NICs' success in particular sectors was even more spectacular [See table 2]. In the textile sector, and despite ever-growing protectionism, developing countries were able to increase their share of U.S. consumption from 7.3 percent in 1973 to 17.4 percent by 1981. Similarly in the steel industry, developing countries increased their share of the U.S. market from 5 percent in the 1960s to 26 percent by 1982.[83] Clearly, a systemic change had taken place in the international trading system, and the United States was feeling the effects.

Table 2

OECD imports of manufactures from the NICs, 1963 and 1977 (percent)

Commodity Group	1963	1977
All manufactures	2.6	8.1
Paper	0.3	2.2
Chemicals	2.1	2.5
Machinery (non-electric)	0.3	2.8
Transport equipment	1.0	2.8
Iron and Steel	1.3	4.8
Non-metallic mineral manuf'g	2.7	4.9
Manufactures of metal	1.5	7.4
Rubber manufactures	0.5	7.5
Textiles	5.7	10.8
Miscellaneous finished manuf'g	4.2	11.2
Electrical machinery	0.8	12.0
Wood and cork manufactures	12.3	23.8
Leather footwe. r & travel	7.2	31.3
Clothing	217.3	38.5

Source: Adapted from OECD tables 4 and 5, in David Greenaway, *International Trade Policy: From Tariffs to the New Protectionism* (New York: St. Martin's Press, 1983), p. 156.

[82] Destler, *American Trade Politics*, p. 47; David Greenaway, *International Trade Policy*, p. 155.

[83] Strange, "Protectionism and World Politics," p. 250.

How does this systemic change relate to the rise of U.S. protectionism? In two ways. First, fiercer international competition has increased the number of U.S. industries that have been hurt by imports, and this in turn has meant that the constituency for protectionism has grown. This is especially the case in the huge steel, automotive, and textile sectors, but many smaller industries have also been affected. Secondly, numerous U.S. industries have suggested that although they could compete against fairly traded goods, they are increasingly forced to compete against unfairly subsidized foreign products. This perception has generated support for protectionism because it has led to calls for tougher trade-remedy laws and more vigorous application of the existing laws.

Because the perception that U.S. industries are facing unfair international competition is so tenaciously and widely held in Washington, it is useful at this juncture to comment briefly on its validity. The evidence is not conclusive in either direction, largely because there is so little agreement on what constitutes a subsidy. All we shall do here is to summarize briefly the arguments of both sides of this debate, and note that we shall return to the issue of subsidization in our chapter on copper.

The idea that the United States has faced unfair international competition is based on the assumption that it subsidizes its production to a lesser degree than its major trading partners. This position is articulated by Gary Hufbauer and Joanna Erb, who argue that industrial subsidies in the United States have consistently been lower and have risen less rapidly than have those of its major trading partners, and that official export credit authorizations have also been proportionately lower [See tables 1 and 3].[84]

The claims of this side of the debate are buttressed when one examines such phenomena as the impact of the European Common Agricultural Program on U.S. farm exports, the lack of adequate international protection for intellectual property rights, or the use of export targeting by any number of states.

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[84] Gary Clyde Hufbauer and Joanna Shelton Erb, *Subsidies in International Trade* (Washington: Institute for International Economics, 1984), pp. 3, 7.

Table 3

Official export credit authorizations related to exports of manufactured goods (percentage)

Country	1973	1974	1975	1976	1977	1978	1979
Canada	na	na	12.3	10.5	10.7	14.9	11.7
United States	19.7	13.3	11.2	8.5	6.9	7.8	8.1
Japan	53.3	43.0	43.2	49.6	43.3	33.8	39.7
France	31.7	35.1	48.9	51.0	38.5	51.7	42.5
Germany	5.9	9.3	10.0	11.4	13.9	11.9	9.6
Italy	4.4	4.1	15.8	10.6	8.0	18.2	13.1
United Kingdom	20.4	44.5	26.5	27.4	23.5	60.9	47.5

Source: US Export-Import Bank, Report to the US Congress on Export Credit competition and the Export-Import Bank of the United States. Compiled using OECD figures

The contrary view asserts that complaints about unfair competition are merely a cover for increased protectionism. Supporters of this position point out that sectors protected by overt non-tariff barriers include 34 percent of U.S. manufactures, compared to 10 percent in Canada, 20 percent in Germany, 32 percent in France, 34 percent in Italy, 22 percent in the United Kingdom, and only 7 percent in Japan. It is particularly unfair, they argue, to single out Japan as being a prominent unfair trader: Japan has abandoned the infant-industry protection that it once practised, its tariffs and overt non-tariff barriers are on the whole as low as or lower than those of the United States, and it imports more as a percentage of GNP.[85] Moreover, they note that although "unfair" competition is never adequately defined, it is nonetheless used in a way that implies that costs of production could or should be equalized. Taken to its logical conclusion, they say, this would mean that comparative advantage would be eliminated and trade would virtually cease.[86] It should also be kept in mind that the United States

[85] Cline, *Reciprocity*, pp. 10-13.

[86] Robert Baldwin, "Protectionist Pressures in the United States," in Amacher, *Challenges*, pp. 236-37.

recovered from the recession of 1981 and 1982 sooner than did most other countries. The effect of this was that the global demand for imports grew unevenly, with the United States registering by far the largest increases. For example, in 1983 and 1984 more than half the growth in world trade was accounted for by increased U.S. imports, and the exports of France, Germany, Japan, Korea, and Taiwan to the United States all rose by more than 33 percent in each of these years.[87] These figures can lead many Americans to the mistaken conclusion that their market has been and is considerably more open to foreign imports than are the markets of other countries, which in turn leads many to support calls for protectionism.

Yet another macroeconomic factor deserving some consideration as a possible source of the new protectionism, at least at the outset of this decade, were the relatively high levels of unemployment experienced by the United States during the late 1970s and into the 1980s. Intuitively, one might expect that, if unemployment rose, so too would the pressure for protection. However, little evidence exists indicating that a such relationship holds on an economy-wide basis. C. Fred Bergsten, for instance, points out that since 1962 periods of high unemployment have often coincided with the adoption of trade-liberalizing measures, and periods of relatively low unemployment have often witnessed increased protectionism.[88] But this is not to say that unemployment in a specific sector (potash, for example) is unlikely to lead to increased protection in that sector, and it is in this context that we suggest a possible link between unemployment and protectionism. In an important study of ITC injury determinations, Robert Baldwin has found that changes in net unemployment, sales, and profits were the conditions most likely to lead to an affirmative injury determination.[89] As well, the fact that many of the industries that have experienced the greatest levels of unemployment (e.g. steel and automobiles) have often been large and politically powerful has meant that the pressure for import relief in these industries has risen greatly.[90] Therefore, although the national level of unemployment may not

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[87] Garten, "Gunboat Economics," p. 540.

[88] Bergsten, *Selected Papers*, pp. 178-79.

[89] Baldwin, *U.S. Import Policy*, pp. 109-10.

[90] But this, in turn, can lead to a reduction in protectionism for industries with less political leverage, as we argue in our chapter on copper.

have had much impact on the overall level of protectionism, sectoral unemployment may have contributed importantly to its rise in the United States.

A final macroeconomic explanation to consider has been the postulated long-term decline in U.S. industrial competitiveness.[91] According to those who focus on this variable, too many U.S. industries are simply no longer able to compete on an even footing with imports, and thus they regard protectionism as a preferred alternative to undergoing a costly and painful contraction or reorganization of their industries; in short, protection beats adjustment. There is obviously no single statistic that can measure competitiveness, but an indication of the competitive problems can be glimpsed from the following: since the late 1960s there has been a steady deterioration in the trade balance; U.S. industries have lost market share in almost all sectors; productivity growth has fallen to unusually low levels; and profitability and investment per worker have also fallen.[92] Furthermore, this trend has been evident in not just a few key sectors but in almost all major industrial sectors, and it has been particularly strong in comparison to Japan and the NICs.

The importance of this is that it suggests that U.S. protectionism may not be simply a response to short-term economic problems but may rather be based on more fundamental long-term problems in its economy. Admittedly, part of the decline in U.S. competitiveness was due to the overvalued dollar, which has since fallen in value, but there are still important structural problems in the U.S. economy that will likely keep up the pressure for protectionism.[93]

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[91] Lester C. Thurow and Laura D'Andrea Tyson, "The Economic Black Hole," *Foreign Policy*, 67 (Summer, 1987): p. 3-21.

[92] Bruce R. Scott, "U.S. Competitiveness: Concepts, Performance and Implications," in *U.S. Competitiveness in the World Economy*, ed. Bruce R. Scott and George C. Lodge (Boston: Harvard Business School Press, 1985), p. 68.

[93] W.M. Corden, "Revival of Protectionism," p. 11.

II: Political Factors

Two political explanations have been advanced for the rise of protectionism in the United States: the first and by far the most important holds that there has been a fundamental breakdown in the way U.S. trade policy is made; the other maintains there was a distinct lack of leadership from the Reagan administration in trade policy, a lack that has been carried over into the Bush administration. We explore these in turn.

To understand why many analysts think there has been a complete collapse in the trade policy-making system in the United States, it is well to have some understanding of how the system operated before it supposedly fell apart. The trade policy-making system that is said to have crumbled in the 1970s (referred to here as the old system) was created in 1934 with the passage of the Reciprocal Trade Agreements Act. This act was significant because it gave the President the authority to enter into bilateral agreements to cut tariffs by up to 50 percent on a reciprocal basis, thereby transferring considerable power over trade policy from Congress to the Executive.[94] Congress continued to exercise its constitutional powers "to regulate commerce with foreign nations" by passing trade laws, but the day-to-day administration of trade policy was shifted to the Executive.[95] The rationale behind this shift was that the experience of the Smoot-Hawley Tariff Act had led many to believe that Congress was excessively vulnerable to protectionist pressures, which the Executive would be better able to withstand.[96] Thus, the corner-

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[94] Although it constituted the first downward movement of tariffs since the Underwood Act of 1913, the Reciprocal Trade Agreements Act was far from a free-trade measure; it could perhaps be best characterized as "adjusted protectionism." William Diebold, Jr., *New Directions in Our Trade Policy,* Studies in American Foreign Relations, no. 2, ed. Percy W. Bidwell (New York: Council on Foreign Relations, 1941), p. 23. For a study of the Trade Agreements Program, see Dick Steward, *Trade and Hemisphere: The Good Neighbour Policy and Reciprocal Trade* (Columbia: University of Missouri Press, 1975).

[95] Finlayson, "Canada, Congress and U.S. Foreign Economic Policy," p. 130.

[96] E.E. Schattschneider in his classic book, *Politics, Pressures and the Tariff* (New York: Prentice Hall, 1935), wrote "Although ... theoretically the interests supporting and opposed to [tariff] legislation are ... approximately equal, the pressures upon Congress are extremely unbalanced. That is to say, the pressures supporting the tariff are made overwhelming by

stone of the old system of trade policy-making was the insulation of Congress from product-specific protectionist pressures. To accomplish this insulation, ways had to be found to deflect these pressures elsewhere, where presumably they might be more easily dealt with. A number of methods were devised to do this.

One of the most important aspects of the old system of trade policy-making was Congress' need for a means of restricting its ability to grant protection. This need was met by making it difficult for protectionist legislation to continue getting passed by any number of Congressional committees. Trade policy-making power within the Congress was instead highly centralized in two committees, the Senate Finance Committee and the House Ways and Means Committee. This made it easier for the President to negotiate deals with the Congress, and it avoided conflicts between congressional committees. Moreover, power was also highly centralized within these two committees; the chairmen controlled their committees very tightly, and a bill was rarely reported out without the chairman's approval. As well, once a bill made it out of committee, the chairman was almost always able to prevent amendments getting attached on the floor. During this era, the seniority system in both houses of Congress kept control over these committees relatively stabilized. This meant not only that groups seeking protection could not advance their cause by unseating a committee chairman, but also in practice that the chairmen tended to be liberal (in the economic sense) southern Democrats who had an uncanny ability to get themselves re-elected. Finally, there was not much danger that junior members of either committee could get very far in pursuit of protection for a favoured industry because there were no subcommittees within which junior members could operate and because the Executive and the chairmen were the only ones who had access to high-quality, independent information on trade.[97]

An important objective of trade liberalizers, under the old system, was to find a method of deflecting pressures away from the Congress when industries felt they were being hurt by imports. This was accomplished in two main ways. The first was to use the trade-remedy laws; the laws had been made liberal enough that it was difficult to obtain relief, yet at the same time the impartiality of the process was such that those who failed to obtain relief did not and could not take their grievances back to the political arena. The

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the fact that the opposition is negligible." p. 285.

[97] Finlayson, "Canada, Congress and U.S. Foreign Economic Policy," pp. 139-40.

second method employed, usually when large industries were seriously hurt by imports, was to accord minimal protection on an *ad hoc* basis, thereby preventing the organization of a broadly based coalition supporting protectionism.

We should mention two further considerations that facilitated the working of the old system. During the era in which it functioned, there was a bipartisan consensus in favour of trade liberalization, and since the public had little interest in trade policy, this meant that the Executive was able to move trade policy in a liberal direction with little or no organized opposition. Moreover, the Executive was able to minimize whatever protectionist pressures existed by arguing that such pressures could damage on-going trade negotiations. Of course, this implied that there always had to be some form of negotiations underway, but in the period between the establishment of GATT and the end of the 1960s, this was usually true.

The breakdown of the old system began in the early 1970s, for reasons involving political changes that were taking place in the Congress and Executive Branch, and in U.S. society. One of the first elements of the old regime to collapse was the seniority system within the congressional committees. In 1971 the Democratic caucus democratized the committee system by selecting chairmen by a vote within the caucus, and by permitting such a vote whenever 10 Democratic members wanted one.[98] This procedure, shortly thereafter adopted by the Republicans, weakened the control of the committee chairmen and eventually led to the ouster of three important chairmen in 1974 and to the retirement in 1975 of the longstanding chairman of the House Ways and Means Committee, Wilbur Mills.

Closely related to this was the growth of subcommittee government. In 1973 the Democrats adopted a "subcommittee bill of rights," which set out a series of new procedures to limit the power of committee chairmen and to increase the role and importance of subcommittees. Committee chairmen were no longer allowed to chair more than one of their own subcommittees, and no member could chair more than one subcommittee. As well, subcommittees were allowed to call their own meetings, choose their own staff, and have bills in their jurisdiction automatically referred to them; all members of the majority party were guaranteed assignment to at least one major committee. Furthermore, the size of the Ways and Means Committee was expanded from 25 to 37, and most of its trade functions were handed over to its Trade

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[98] Ibid., p. 145.

Subcommittee.[99] These changes increased substantially the opportunity for junior members to contribute meaningfully to the legislative process. In 1983, for example, all but one Republican Senator chaired a committee or subcommittee, and more than half of the House Democrats held similar positions.[100] It might be argued that, since subcommittee chairmen are not as powerful as committee chairmen, their ability to resist protectionism is considerably less.

As the importance of subcommittees has grown, so too has the phenomenon of multiple committee referrals, sparked by the tendency of trade negotiations to deal increasingly with non-tariff barriers. As a result, trade has been brought into the jurisdiction of an expanding number of subcommittees. In 1982, for example, there were 18 congressional committees and 21 subcommittees with some jurisdiction over trade.[101] The phenomenon of multiple committee referrals has made it more difficult to pass trade legislation, increased the number of groups that can influence trade policy, and weakened the power of the Senate Finance and House Ways and Means Committees.

Another important contributor to the breakdown of the old system has been the ability of individual members of Congress to make themselves much less dependent on information supplied by committee chairmen, for a number of reasons, among which has been the rapid increase in the size of standing committee staffs. In 1955 there were only 386 committee staffers in the Senate and 329 in the House, but in 1983 these numbers had risen to 1000 and 2000.[102] At the same time, there has been a sharp rise in the personal staffs of members of Congress. From 1972 to 1980, these staffs in the House rose from 5280 to 7000; those in the Senate went from 2400 to 3600.[103] In addition, members of Congress have new or improved support services, such as the Congressional Research Service, the General Accounting Office, the Office of Technology Assessment, and the Congressional Budget Office.

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[99] Destler, *American Trade Politics*, p. 59.

[100] M.J. Abrams, "Congress and the Trade Policy-Making Process," Speech to the Trade Policy Committee of the Canadian Manufacturers Association, Washington, 6 October 1983, pp. 13-14.

[101] Finlayson, "Canada, Congress and U.S. Foreign Economic Policy," pp. 149-50.

[102] Abrams, "Congress and the Trade Policy-Making Process," p. 17.

[103] Finlayson, "Canada, Congress and U.S. Foreign Economic Policy, p. 147.

These enhanced resources not only make a member of Congress more independent of a committee chairman, but they also make it easier to challenge a chairman who is trying to resist protectionism.

Finally, a set of new procedures was adopted to make the workings of Congress more transparent. Committee hearings were opened up to the public and recorded votes were held, even on amendments. This naturally tends to contribute to increasing the degree of public scrutiny of members of Congress, arguably making it more difficult for them to reject pleas for protectionism from important constituents.

Also of significance to the breakdown of the old system has been the erosion of the Executive's power in trade policy-making. In particular, the Executive branch has found it more and more difficult to get authority for multilateral trade negotiations, and has been forced into working with Congress on the formulation of major new trade acts. As well, presidential discretion in trade actions has also been coming under attack. In 1984 Congress gained the right to pass a resolution overturning a president's decision to ignore an affirmative ITC injury ruling, and the 1988 trade legislation will require retaliation against countries that do not open their markets adequately to American products. The transfer of decision-making authority in antidumping and countervailing duty cases from the Treasury Department to the ITC has further weakened Executive branch powers.

The history of the Office of the United States Trade Representative (USTR) illustrates well this weakening of Executive authority over trade policy-making. The USTR was set up in 1962 under the Trade Expansion Act and given the authority to negotiate international trade agreements for the United States. From the beginning, however, the USTR's position was somewhat tenuous. President Nixon made two attempts to kill the position of USTR by amalgamating it within his Council on International Economic Policy, and it was not until 1974 that Congress made it a statutory agency within the Executive Office of the President. The USTR was strengthened and expanded by President Carter in 1979, but once again, in 1983, an administration tried to subsume it within a new Department, the mooted International Trade and Industry. The ambivalent attitude of most presidents towards the USTR, coupled with its lack of visible leverage when trade negotiations are not underway, has weakened Executive leadership in trade policy-making.

Two broader societal factors contributing to the breakdown of the old system are also worthy of mention. First, the bipartisan consensus in favour of liberal trade policies has clearly disappeared. The Republicans as a rule continue to support trade liberalization, but the Democrats are now more

likely to favour protectionist policies. The best explanation for this shift concerns the changing electoral bases of the two main parties. The traditional political base of the Democrats used to be the south, whose voters had a longstanding bias towards free trade. Over the past few decades, however, there has been a shift resulting in greater prominence for the Republicans in the south and west, with the Democrats gaining ascendancy in the "Rustbelt" states of the midwest. This new political alignment puts one of the Democrats' main bases of support in a region that is much more likely to call for protectionism; not surprisingly, the Democrats have felt the need to express the interests of this constituency.

The second societal factor implicated in the breakdown of the old system inheres in the growth in the number of groups active in the field of trade policy, and also in the existence of a broadly based coalition supporting protectionism. The increasing involvement of domestic groups in the trade policy-making process stems from the fact that there are now more economic entities that are affected by trade, with the result that these groups have considerably increased the pressure on Congress to enact protectionist legislation. That the U.S. labour movement now supports protectionism is even more significant, for it had traditionally supported trade liberalization; beginning in the early 1970s, its position reversed. The reasons for this change are too numerous to mention here, but its effect has been to increase the protectionist pressures on the Democratic Party and the Congress in general.[104]

Taken together, these political factors supply a persuasive explanation for the rise in U.S. protectionism. In summary, the traditional mechanisms that had been devised to shield the Congress from protectionist pressures had either disappeared or been greatly weakened. The pressures on Congress became stronger and more persistent, the Executive branch's ability to divert attention away from the Congress had been reduced, and the internal mechanisms within Congress that had been used to prevent protectionism had all broken down. No new liberalizing system has been devised to replace the old one, and consequently the amount of protectionism granted has risen considerably.

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[104] David Willett, for example, suggests that the U.S. labour movement's support for protectionism indicates a willingness to accept slightly lower income in favour of increased security against dislocations. "Major Challenges to the International Economic System," in Amacher, *Challenges*, p. 24.

There is a further political explanation of the rise of the new protectionism in the United States: the lack of leadership shown by the Reagan administration in the field of trade policy. Incredible as it may seem, for nearly a full year after the 1984 election the Reagan administration took almost no action in the field of trade policy, and this despite the fact that the trade deficit and value of the dollar were both soaring. The President refused to intervene in foreign-exchange markets to halt the rise of the dollar, and his veto of a textile industry bill seemed to confirm the suspicion that he was unconcerned about the plight of those hurt by imports. The situation was further aggravated by the length of time (more than three months) consumed in getting Clayton Yeutter installed as the new USTR (which gave the appearance that nobody was really in charge of trade policy), as well as by the widespread perception that Yeutter lacked the political clout of some of his predecessors, such as Robert Strauss or William Brock. The absence of leadership shown by the Reagan administration in 1985 meant that Congress was not being shielded by the Executive from protectionist pressures, and consequently the ability of Congress to resist these pressures was considerably reduced. Although this explanation cannot account for the rise of protectionism prior to 1985, it does provide a good starting point for understanding the context within which the Omnibus Trade Bill appeared in 1986.

Conclusion

The growth of new protectionism in the United States has been both cause and consequence of the "hegemonic decline" of that country in the world economy. Advocates of this thesis are many, and include such writers as Charles Kindleberger, Robert Gilpin, and Stephen Krasner, who suggest that it is the role of a hegemonic power to maintain an open international trading system and that, as the power of the hegemon declines, a pattern of increasing protectionism will appear. They argue that only a hegemonic power has both the power and the interest to establish and maintain an open trading system, but as its power recedes it will become increasingly unwilling or unable (or both) to perform the role it once played.

This systemic explanation of the new protectionism raises two important questions:

- is the United States experiencing hegemonic decline?
- if it is, how well might this explain the growth of protectionism?

The existence of U.S. hegemonic decline is disputed by some, but we argue there are some apparent signs of it.[105] Between 1950 and 1980, for example, the U.S. share of world trade fell from 20 to 10 percent and its share of world product fell from 40 to 20 percent.[106] The termination of the Bretton Woods system, the collapse of the U.S.-sponsored international energy regime in 1973, and the weakening of the GATT also point in the direction of U.S. hegemonic decline. Although this explanation correlates well with the trend towards increasing protectionism, it is difficult to assess the extent to which the latter trend is a function of hegemonic decline. Indeed, it seems at times as if "hegemonic decline" itself, far from explaining change, is really only a code word for the collection of factors (many of which we discuss above) that together account for change.

There is a second, rather different, systemic explanation that associates the rise of the new protectionism with the absence of meaningful multilateral trade negotiations. The "bicycle theory," as this explanation has been called, asserts that the trading system must continue to make progress towards trade liberalization or risk falling into a morass of protectionism.[107] The argument goes on to suggest that it is easier for a government to resist protectionism when it can point to the existence of trade negotiations, but more difficult when there are none underway. This theory accounts well for the rise of U.S. protectionism in the period after the Tokyo Round, because the failure of the GATT Ministerial Meeting in October 1982 and the skepticism about the prospects for the Uruguay Round have arguably made it difficult to resist protectionism. However, the explanation is much less applicable to the 1970s. For most of this period the Tokyo Round was underway and the Carter administration made considerable use of its right to waive countervailing duties, yet the level of protectionism still rose. Thus, the validity of this theory must remain open to doubt.

Moreover, and especially germane to our study, is the possibility that the absence of optimism for the multilateral route to liberalization may have accounted, *faute de mieux*, for the interest of the administration in securing a

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[105] See, for a skeptical view, Samuel P. Huntington, "The U.S. - Decline or Renewal?" *Foreign Affairs* 67 (Winter 1988-89): pp. 76-96.

[106] Finlayson, "Canada, Congress and U.S. Foreign Economic Policy," p. 141.

[107] Destler, *American Trade Politics*, p. 13.

bilateral accord with Canada. Ironically, it could well be the current pessimism attending the future of multilateral trade liberalization that has led to the quest for bilateral liberalization in the United States as well as in Canada (albeit for slightly different reasons).[108]

But before bilateral liberalization measures could succeed, a resolution of difficulties on a wide front of trade-policy makers was needed. In the next three chapters, we discuss some of the recent policy disputes and implications regarding three commodities in bilateral trade, potash, copper, and uranium.

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[108] U.S. motivation for the bilateral trade agreement with Canada is discussed in Sidney E. Weintraub, "U.S.-Canada Free Trade: What's In It for the U.S.?" *Journal of Interamerican Studies and World Affairs* 26 (May 1984): pp. 225-44. Helpful for shedding light on U.S. perceptions of the FTA is Clyde H. Farnsworth, "U.S.-Canada Pact Implies Big Change for World Trade," *New York Times*, 23 November 1988, p. 1.

3. The Politics of Antidumping: The Potash "War" of 1986-88

Introduction

On 8 January 1988, the United States Department of Commerce entered into a suspension agreement with Canadian potash producers, whereby the Americans would agree to suspend the antidumping investigation of Canadian selling practices in return for the Canadians agreeing that most of the potash they sold in the U.S. market would be priced at a level not much below its estimated market value outside the United States. Under the terms of this agreement, the Commerce Department will monitor Canadian shipments of potash to the United States, and reserves the right to institute administrative reviews of such shipments, either upon the request of a U.S. producer or upon its own initiative. Should there be no cause to conclude that Canadian producers are selling at a price sufficiently low to have an "injurious effect" upon U.S. producers of the commodity, then Commerce expects to terminate both its suspended antidumping investigation and the suspension agreement by January 1993. (It should be noted that the Canadian signatories to the agreement did not concede that their shipments to the U.S. market had an injurious effect upon U.S. potash producers.)[1]

Thus has ended, at least for the moment, the most recent set of skirmishes in the potash "war" of the late 1980s, a conflict that pitted two U.S. potash producers, abetted by some tenacious Congressional supporters and availing

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[1] In what must rank as one of the most inelegant sentences ever crafted by the English-speaking legal profession, the agreement stipulates that Canadian producers and exporters would each ensure that the price they "will charge for each entry of potassium chloride exported to the United States from Canada for consumption in the United States will be such that any amount by which the estimated foreign market value exceeds the United States price will not exceed 15 percent of the weighted-average amount by which the estimated foreign market value exceeded the United States price for all less-than-fair-value entries by such signatory producer[s]/exporter[s] that were examined during the Department's investigation." U.S. Government, *Federal Register*, vol. 53, no. 11, 19 January 1988, pp. 1393-94.

themselves of U.S. antidumping law and administration, against the entire Canadian potash industry. It has been an episode that, like most battles, was marked by more than one ironical development, and it is our purpose in this chapter not only to detail and analyze the specifics of the case itself, but also to probe some of the legal and administrative matters subsumed under the rubric of U.S. antidumping law and practice. Prior to undertaking these matters, however, we should like to note at least three major ironies associated with the recent potash controversy.

The first has to do with the timing of this latest round in a series of antidumping allegations in potash that first affected Canadian interests in 1969.[2] Not only did this dispute break out precisely as Canadian and U.S. negotiators were wrestling with the details of the bilateral trade accord initialled by the two countries in October 1987, and signed by them in January 1988, but there is good reason to believe, as we shall argue below, that the very existence of the free-trade talks served as a spur to this challenge to Canadian potash markets in the United States.[3] And this, notwithstanding that the Reagan administration has probably been more ideologically disposed toward free trade than any U.S. administration of the past 35 years.

The second irony also is related to ideological conviction, but the conviction in this instance is that of the current Saskatchewan government, which is fairly passionate about the virtues of privatization, so much so it seems that it can hardly wait to sell off the province's remaining Crown corporations.[4]

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2 U.S. International Trade Commission, "Potassium Chloride from Canada," Determination of the Commission in Investigation no. 731-TA-374 (Preliminary) under the Tariff Act of 1930, together with the Information Obtained in the Investigation, USITC Publication 1963 (Washington, March 1987), p. 2. Also see, for a discussion of more recent antidumping suites against Israeli, East German, Spanish, and Society potash producers, G.S. Barry, "Potash," in *Canadian Minerals Yearbook 1985* (Ottawa: Energy, Mines and Resources Canada, 1986), p. 48.7.

3 The full text of the bilateral trade accord is contained in Government of Canada, Department of External Affairs, *The Canada-U.S. Free Trade Agreement* (Ottawa, 1988).

4 For an analysis of the Devine government's policy toward the provincially owned potash sector, see Maureen Appel Molot and Jeanne Kirk Laux, "Barriers to Exit: Government Ownership and the Potash Corporation of Saskatchewan," in *Public Corporations and Public Policy in Canada*, ed. Allan Tupper and G. Bruce Doern, rev. ed. (Montreal: Institute for Research on Public Policy, forthcoming). For an earlier discussion of the animosity attending the provincial government's entry into the potash business, see the same authors' "The Politics of Nationalization," *Canadian Journal of Political Science* 12 (June 1979): 227-58.

We do not wish to enter into the longstanding debate over the relative merits of privatization.[5] However, we should like to underscore that in late summer of 1987 when the Saskatchewan government felt itself literally with its back pushed against the wall by a U.S. Commerce Department preliminary determination that Canadian potash producers were dumping in the U.S. marketplace, it responded by availing itself of the Crown-owned Potash Corporation of Saskatchewan (PCS) to force a price hike that would have the effect both of partly neutralizing the Commerce action and of awakening latent U.S. anti-protectionist forces (in the event, the large farm lobby). As we shall detail below, there was something touching about the alacrity with which Regina resorted to a policy lever of which, only a short time before, it was showing positive frenzy to unburden itself. Indeed, the new-found (if temporary) love for PCS shown by the Devine government demonstrates once again that, as Shakespeare has said, "there is no virtue like necessity."[6]

The final irony is that the U.S. protectionist challenge may have wrought some good to the Canadian potash sector, however unintended it may have been. It might seem contradictory to see in yet another instance of managed trade a potential benefit for Canadian producers. Nevertheless, it is conceivable that the Canadian potash industry will find itself capturing more economic "rents" from its sales in the U.S. market because of the recent dispute than it might have captured without it. One columnist went so far as to write, in the wake of the Commerce Department's preliminary determination of dumping, that the action could be "the best thing to happen to the Saskatchewan potash industry in years."[7] The logic for this claim is that the Commerce ruling would cause the Saskatchewan government to attempt an exercise of market power to achieve a greater return for the province's potash mines than they could otherwise get, given the current overcapacity in the industry. As

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5 A good analysis of the debate over privatization is found in Jeanne Kirk Laux and Maureen Appel Molot, *State Capitalism: Public Enterprise in Canada* (Ithaca: Cornell University Press, 1987), pp. 107-114. See also, for a specific examination of PCS, Nancy Olewiler, "The Potash Corporation of Saskatchewan: An Assessment of the Creation and Performance of a Crown Corporation," Discussion Paper no. 303 (Ottawa: Economic Council of Canada, April 1986).

6 William Shakespeare, *The Tragedy of King Richard the Second*, Signet Classic Shakespeare, ed. Kenneth Muir (Toronto: New American Library, 1963), p. 60.

7 Bruce Johnstone, *Leader-Post* (Regina), 5 September 1987, p. C10.

we shall argue, something like this does indeed seem to have happened, and in this respect the recent potash war might have the same sort of potential benefit some have discerned in the softwood lumber settlement of 30 December 1986, which saw Canada agree (reluctantly) to impose an export tax on its sales to the United States.[8] This is not to minimize either the spread or the gravity of the "New Protectionist" challenge; it is only to note that, in some instances and depending upon who pays the price of protectionism, the effect of managed trade upon Canada need not be adverse, at least in the short run. So far, the suspension agreement seems to have brought mostly beneficial results to the Canadian potash industry: with prices in mid-1989 at nearly C$110/tonne KCl (compared with C$70/tonne two years earlier), the industry is profitable once again.[9]

To understand how this dramatic reversal in the fortunes of Canada's potash producers occurred, it is necessary to begin with an examination of the institutions, law, and administrative procedures that have played such a prominent role in the recent politics of Canada-U.S. potash trade.

U.S. Trade Law and Regulation of Antidumping

The potash dispute brings into crisp focus some of the major institutional players in the administration of trade law in the United States. As well, it highlights an important aspect of that trade law: the statutes dealing with antidumping, and the way they have been interpreted over time. We deal with these matters below, but first we shall briefly discuss the concept of "dumping," given its centrality to the potash case study. Perhaps it is fitting, in light of the large Canadian share (more than 40 percent) of global trade in potash,

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[8] For an interesting elaboration of this argument, see John Richards, "U.S. Lumber Lobby Deserves a Cheer," *Globe and Mail* (Toronto), 20 February 1987, p. A7. Richards maintains that while the Canadian forest-product companies might not have derived gain from the imposition of the 15-percent export tax, both the Canadian public and state did gain, as a result of "a dramatic increase in ... capture of forest rents." But for a different view of the dispute, cf. Michael B. Percy and Christian Yoder, *The Softwood Lumber Dispute and Canada-U.S. Trade in Natural Resources* (Halifax: Institute for Research on Public Policy, 1987).

[9] Interview, Ottawa, 8 June 1989. For a summary of domestic and international developments in the industry, see G.S. Barry, "Potash," in *Canadian Minerals Yearbook 1988* (Ottawa: Energy, Mines and Resources Canada, 1989), pp. 49.1 - 49.24.

that the classic work on dumping should have been written by a Canadian economist, Jacob Viner. In his 1923 book, *Dumping: A Problem in International Trade*, Viner defined the practice as "price discrimination between national markets."[10] Since Viner's time there have been definitional refinements made to the concept, which today is usually taken to refer to a producer selling a product either at home or abroad at a price greater than its price in a third country; the selling price in the latter, thus, is held to be representative of "less than fair value" (LTFV), a very important category indeed when discussing dumping.

The United States has been granting relief from dumping since 1916, and is by no means the only country to do so. There are actually two antidumping statutes. The first is the rarely used Antidumping Act of 1916, rarely used because its standards of intent and proof are so stringent that no plaintiff has ever received a favourable decision under it. It is of no moment to our study of potash, and will be discussed no further. The element of U.S. trade law that does matter in this chapter is Title VII of the Tariff Act of 1930, and its recent technical amendments (in 1979 and 1984). The 1930 legislation was based upon the Antidumping Act of 1921, which has also served as the inspiration for Article VI of the General Agreement on Tariffs and Trade, which applies to dumping disputes.

During the 1960s concern was growing within the GATT over the abuse of antidumping laws by several countries intent upon giving their domestic industries protection; thus in 1967 GATT established a Code that was intended to clarify, standardize, and supplement Article VI actions. This code was further modified during the Tokyo Round negotiations, with the modifications being incorporated into U.S. legislation through the Trade Agreements Act of 1979. One title (Title I) of that act repealed the Antidumping Act of 1921; an entirely new title (Title VII) was then added to the Tariff Act of 1930, and it is this title that incorporates the provisions of the GATT Antidumping Code. Perhaps the most salient legislative feature for the purposes of this analysis is Section 731 of the 1930 Act, for it establishes the legal and procedural grounds for the chain of potash-related events that we shall shortly detail.

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[10] Quoted in Theordore W. Kassinger, "Antidumping Duty Investigations," Book 1, *Law & Practice of United States Regulation of International Trade*, comp. and ed. Charles R. Johnston, Jr. (New York: Oceana Publications, June 1987), p. 5. The following material in this section draws upon Kassinger's summary, unless otherwise noted.

According to this section, an antidumping duty shall be imposed if

- the Commerce Department determines the good in question is being sold in the United States at LTFV;
- and in addition, the U.S. International Trade Commission determines that, as a result of the imports under investigation, a U.S. industry is "materially injured, or is threatened with material injury."

There is also a provision to grant import relief to a domestic industry that is not even in existence yet, but this seldom occurs. Should the two conditions be met, an antidumping duty will be imposed, equal to the amount by which foreign market value has been "determined" to exceed the U.S. price for the goods, otherwise known as the "dumping margin."[11]

The Department of Commerce is the administering authority for antidumping actions. In addition to being charged with determining whether dumping has taken place (and if so, to what degree), Commerce's International Trade Administration (ITA) is responsible for instituting investigations, issuing antidumping orders, and reviewing these orders. It is in theory supposed to be able to transcend the political fray that perpetually bestirs Washington; in reality, it is itself a real part of the politics of trade in the capital, and can at times act in a partisan fashion, perhaps unavoidably, in the pursuit of its administrative duties. Also supposedly divorced from political forces is the quasi-judicial International Trade Commission (ITC), headed by a six-member panel of political appointees whose job it is to determine injury in antidumping, countervail, and escape-clause cases. Given the upsurgence in trade actions in the United States, a cause and consequence of the new protectionism we discussed in the previous chapter, the ITC has been transmogrified from a sleepy backwater of government a half-dozen or so years ago to a rapidly growing agency that now has more than 500 officials working for it.[12]

An antidumping case can begin in one of two ways: a domestic company can file simultaneous petitions with both the Department of Commerce and ITC. The Department of Commerce can also self-initiate an investigation

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[11] U.S. Congress, House Committee on Ways and Means, Subcommittee on Trade, *Overview of Current Provisions of U.S. Trade Law*, 98th Cong., 2d sess. (Washington: U.S. Government Printing Office, December 1984), pp. 39-40.

[12] Interview, Washington, 20 June 1985. For a synopsis of the ITC's mandate and procedures, see U.S. International Trade Commission, *Citizen's Guide to the Statutory Procedures of the United States International Trade Commission* (Washington, ITC Public Affairs Office, n.d.).

(although it rarely does); in so doing, it must notify the ITC. Once an investigation is begun, the process requires that the ITC make the first move, which is a preliminary injury determination.[13] It has 45 days to do this once the petition has been filed. While the ITC is trying to determine injury, Commerce proceeds with its preliminary investigation, which it must usually complete within 160 days. It may speed up its preliminary investigation of dumping, but it cannot issue its preliminary determination before the ITC has released its own. Commerce may also postpone its preliminary determination until as late as 210 days after the investigation has been initiated.

For the case to proceed, the ITC must make an affirmative determination regarding injury. At this stage, all that the ITC need do (and in such cases all it usually does) is establish that there exists a "reasonable indication" of material injury because of imports. This tends to be not too hard to establish, especially in view of the rather broad compass given to those charged with discovering such injury; not only is the actual injury (or reasonable indication of same) grounds for a preliminary affirmative determination, but the mere threat of such injury can also lead to the same conclusion. And, as noted above, it is not even necessary that the threat apply to a domestic producer currently making the goods in question, because should a domestic industry be "materially retarded" from establishing itself in the sector in question, then this too constitutes a basis for a preliminary injury finding. Although in theory an affirmative determination can rest on any of these three categories, it is largely upon the basis of the first (i.e. the actual injury to an existing firm) that most injury determinations are made, at either the preliminary or final stage of the ITC's investigation.

What exactly is "material injury"? According to the statute, material injury means "harm which is not inconsequential, immaterial, or unimportant." This wording may be clear enough, but it is also close to being meaningless; in any case, it leaves sufficient room for all but the dullest imaginations to manoeuvre themselves into a finding they would identify at the outset as desirable. For a time, there was some worry in Congress that by adopting in 1979 the GATT Subsidies and Antidumping Codes which refer to "material" injury instead of the former unmodified "injury" of the 1921 antidumping statute, the United States would have a more stringent injury test than heretofore. The worry turned out to be baseless; as a leading antidumping lawyer notes, "the legislative history makes clear that the Commission is to interpret the term

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[13] That is, the first move after Commerce decides that the petition satisfies the criteria for acceptability, a decision it must make within 20 days of filing.

'material injury' in a manner consistent with its prior practice. In general, this has meant that any injury more than *de minimis* meets the statutory standard."[14]

But finding material injury, no matter how vapid the definition of that term, is only one of the ITC's tasks. It must somehow link the injury to imports, and here again the practice is marked by the same permissive bravado as the definition, for in conducting their causation analysis, the commissioners are not obliged to assign a relative weight to various "causes" of an injury. Indeed, the causal link need be neither "principal," "substantial," nor "significant" (words that do have meaning in escape-clause, or Section 201, investigations). All that is required is that the link be "material," which is logical in a way, given that same modifier's presence in the injury category. In fact, one could say that it is more than logical; it is tautological. The above discussion puts us in mind of Samuel Johnson's comment about a dog walking on its hind legs: "It is not done well; but you are surprised to find it done at all."[15] As with the dog, so too one is surprised by U.S. antidumping law and practice; the wonder is that there have actually been instances when no preliminary injury determination has been made by the ITC: that is, when respondents have been able to "beat the rap" under these less-than-exigent terms.

Once the ITC has made an affirmative determination of injury, the case returns to the Department of Commerce, which must now establish whether dumping has in fact taken place, and to what extent. As mentioned above, Commerce can have up to 210 days from the onset of the investigation to complete this stage of its inquiry. Significantly, even should Commerce's preliminary determination result in a negative finding with respect to dumping, the case will be continued by that Department through a final determination. Commerce will normally have 75 days from its preliminary determination to reach its final decision on dumping, although in some circumstances it can postpone this decision for 60 more days. Should the final Commerce determination be negative, then the investigation will be terminated; if it is positive, then the ITC institutes an investigation to reach its final injury determination. This last investigation must result in a positive injury finding if dumping duties are to ensue. The ITC must issue its final determination

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[14] Kastinger, "Antidumping Duty Investigations," p. 46.

[15] Samuel Johnson, *Boswell's London Journal*, entry of 31 July 1763 (London: Reprint Society, 1952), p. 319.

within either 120 days of a positive Commerce preliminary determination or 45 days of Commerce's final determination. However, if the Commerce Department's preliminary determination was negative but its final determination positive, ITC has 75 days from the final Commerce finding to issue its own final determination. If this is also positive, then the matter returns to the Commerce Department, which must issue an antidumping order within 7 days. These steps are summarized in table 4.

Table 4

The four principal stages of antidumping investigations

Agency	Stage	Action/Consequences
ITC	Preliminary injury	Negative finding ends investigation
Commerce Department (ITA)	Preliminary dumping	Either positive or negative determination sends investigation to next stage
Commerce Department (ITA)	Final dumping	Negative finding ends investigation
ITC	Final injury	Negative finding ends investigation

Source: Theodore W. Kassinger, "Antidumping Duty Investigations," Book 1, *Law & Practice of United States Regulation of International Trade*, comp. and ed. Charles R. Johnston, Jr. (New York: Oceana Publications Inc., June 1987).

There is a way, and an important one as we shall discover, that the process can be halted; but for the moment, let us continue with the analysis of how Commerce undertakes to prove or disprove that dumping occurs, and how it arrives at dumping margins. As we indicated earlier, perhaps the most critical distinction in dumping investigations is the notion embodied by the expression "less than fair value." It may not surprise those who have been following our discussion so far to find that "fair value" is not defined in statute. Instead, it is deemed to be a function of the amount by which a good's foreign market

price exceeds its U.S. price, *ceteris paribus*. Establishing a foreign market value is no easy task, and to this end the Commerce Department applies three tests, listed here in the department's order of preference:

- the first is the price of the good in its home market (i.e. what it sells for in the country where it is produced);
- the second test, should the first be ill-suited for the task, is the price for which the good sells in countries abroad other than the United States;
- the third and last is a "constructed" price, which seeks by a process of induction to arrive at a home-market value that can serve as a LTFV standard.

In the case of the bilateral potash dispute, it was principally this third test that was invoked by the Commerce investigators in their quest to determine the existence and severity of dumping. How is a constructed value arrived at? Although some might say by sheer legerdemain, there does appear to be a logic and rationality to the concept. The following assessments constitute the cumulative bases for a constructed value:

- the costs of materials incorporated in the production process;
- an amount for "general expenses," which averages about 10 percent of the costs of materials;
- an amount for profit, which is at least 8 percent of the sum of these costs and expenses;
- the costs of packaging and otherwise preparing the good for shipping to the U.S. market.

It should be noted that the amounts added for both general expenses and profit can exceed the benchmark percentages given above. It should also be noted that the constructed-value test is likely to lend itself to a finding of dumping when markets are flat and producers are cutting their profit margins to the bone to maintain market share.

We referred earlier to an important avenue for halting the process we summarized in table 4: i.e. the provision for a suspension of the investigation. As this provision was invoked in the Canada-U.S. potash war, it is worthwhile recounting how it works. An antidumping investigation may be halted in its tracks by the Department of Commerce if two conditions obtain. The first is that the exporters must agree to moderate their marketing practices, either by promising to cease their exportations to the U.S. within six months of suspension of investigation or by raising their prices sufficiently so that

dumping can no longer be alleged to be taking place. The second is that the Commerce Department must be satisfied that a suspension of the investigation would be in the public interest, and that the situation could be monitored by it and the ITC. At the request of the petitioner(s), these two agencies may proceed to final determinations that, if positive in each instance, will produce an antidumping duty which is held in abeyance for as long as the suspension agreement remains in force. Alternatively (as in the bilateral potash dispute) the investigations can be halted, literally in midstream. Should a subsequent review of the suspension agreement lead the ITC to find that there has been no elimination of the injurious effects of imports, then it and the Department of Commerce will resume their investigations.

The process to which exporters facing U.S. antidumping suits are subjected is, as we have outlined, complex, unpredictable, and arbitrary. It is little wonder that Canadian producers see in U.S. antidumping laws and procedures a fundamental challenge to their economic vitality. Nevertheless, it does appear to us that the process may contain, at least in some cases, the potential for achieving positive outcomes, however unforeseen these might be, for the exporter. This appears to be what has happened in the case of potash, and it is to an analysis of that case that we now turn.

The Current State of the Potash Market

Any account of the Canada-U.S. potash war must begin with an appreciation of the state of the potash industry at mid-decade, for the concerns that give rise to and sustain antidumping investigations are extremely sensitive to downturns in the market. Thus, when a situation of oversupply prevails, there is a greater chance that both LTFV pricing and domestic injury will occur, or at least will be alleged to occur. At the most general level, the bilateral potash conflict has its origins in the plight of the U.S. farming industry, for the sharp decline in the amount of acreage under cultivation in the United States in recent years has been chiefly responsible for the current slump in potash markets in North America.[16] Although it would be fruitless for us to attempt an analysis here of the causes of U.S. agricultural misfortune, it is worthwhile to sketch the basic structural features of the U.S. potash market, as well as to

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[16] Günter Rüping, "What Factors Will Influence Potash Markets in the Next 25 Years?," *Phosphorus & Potassium*, no. 150 (July/August 1987), pp. 26-27.

outline some of the salient considerations regarding the consumption of potash, both in the United States and elsewhere.

Potash is a generic name for a variety of potassium forms, but the most common "potash" is potassium chloride (KCl), otherwise known as muriate of potash (MOP). In the United States, as elsewhere, the vast majority of potash consumed goes to fertilizers, for there really is no substitute for potassium as an essential nutrient for plants, where it assists in the synthesis of starch and sugars, and works in the root cells to aid the synthesis of amino acids and inorganic nitrogens. As well, potassium develops stronger and thicker outer walls in the epidermal cells of plants. By far the principal user of MOP in the United States is corn, followed by soybeans and wheat. In all, some 94 percent of U.S. potash consumption is accounted for by fertilizers, and 94 percent of this figure consists of MOP.[17]

Three interrelated developments underlie the bilateral potash dispute:

- the declining productivity of U.S. potash mines;
- the increased penetration of the U.S. market by efficient Canadian producers;
- the slump in the U.S. market for fertilizer.

We examine this last condition first. The 1980s have hardly been good years for the U.S. farming sector, and it comes as no surprise that declining farm exports - which have shrunk by a third during this decade - have been translated into a drop in the domestic demand for fertilizer. Adding to the downward pressure on fertilizer sales has been a series of programs, initiated by Washington in 1983, to reduce the amount of acreage in production. During 1983 alone some 800 million acres, about 40 percent of total U.S. farmland, were idled. By 1986 U.S. apparent consumption of potash had declined 20 percent from 1984's figure, so that whereas U.S. farmers in the earlier year were using some 10.3 million short tons of potassium oxide (K_2O) equivalent, by 1986 they were applying only 8.4 million.[18] Observed one potash expert, in respect

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[17] James P. Searls, "Potash," Preprint from Bulletin 675, Bureau of Mines, *Mineral Facts and Problems, 1985 Edition* (Washington: U.S. Department of the Interior, 1985), pp. 1, 8-9.

[18] ITC, "Potassium Chloride," pp. 6, A10. Potash statistics are often expressed in terms of K_2O equivalency. Pure muriate of potash (potassium chloride) is only 63.176 percent K_2O. As a rule of thumb, to establish the potassium chloride (KCl) quantity implicit in a K_2O equivalency number, one divides the latter by 0.6. Thus 600 tons K_2O is equal to 1,000 tons KCl.

of Washington's acreage-reduction measures, "government programmes ... are having a catastrophic effect on all fertilizer sales in the United States."[19]

Notwithstanding a drop in the U.S. demand for fertilizer over the past few years, there has been an increase in Canadian exports to the United States during this same period. Indeed, as a share of domestic consumption, potash imported from Canada constituted 76.7 percent in 1984, 82.6 percent in 1985, and 84.3 percent in 1986.[20] In Saskatchewan, where potash is the province's third-largest industry, the U.S. market was and is of critical importance, absorbing some 60 percent of total output.[21] The other producing province, New Brunswick, is much less dependent upon the U.S. market, to which it ships about 30 percent of its output, which in turn accounts for less than 8 percent of U.S. consumption.[22] All in all, about 90 percent of Canada's potash exports to the United States originate in Saskatchewan;[23] and although the share of total Canadian exports accounted for by U.S. purchases did decline between 1984 and 1986 - from 63.5 percent to 59.3 percent - the absolute volumes sent to the U.S. market continued to grow, as table 5 illustrates.[24]

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19 Ed Wheeler, "The Next Twenty Years," *Phosphorus & Potassium*, no. 150 (July/August 1987), pp. 22-23.

20 ITC, "Potassium Chloride," p. 9.

21 "Potash Price Increased 60% to Protest U.S. Import Duties," *Winnipeg Free Press*, 5 September 1987, p. 9.

22 "Potash Mines not Curbing Production," *King's County Record*, 8 September 1987, p. 2; Stephen Ewart, "N.B. Production Mainly Unaffected by Dispute," *Telegraph-Journal* (Saint John), 8 September 1987, p. 32.

23 Dale Eisler, "U.S. Potash Duties Spark Tory Response," *Winnipeg Free Press*, 24 September 1987, p. 7.

24 ITC, "Potassium Chloride," p. A30.

Table 5

First-quarter exports of potash from Canada, 1986/87
(Expressed in thousands of short tons K_2O)

Importing Region	Jan/March 1987	Jan/March 1986
Oceania	66.6	42.8
Asia	685.6	433.7
Latin America	35.5	76.9
United States	1,344.2	1,268.2
Western Europe	41.7	48.5
Other	42.4	35.0
Total	2,216.1	1,905.4

Source: *Fertilizer Focus*, July 1987, p. 11.

With further slippage in U.S. consumption anticipated, Canadian producers have been attempting to locate offshore markets for their potash. There has been a noticeable lessening of Canada's dependence on the U.S. market, even if that dependence does continue to be fairly high. Until recently, the ratio of Canada's offshore-to-North American sales had been about 30:70; but by June 1989 the ratio had improved to 45:55.[25] Even though some new offshore markets can be developed relatively quickly, the fortunes of Canada's potash industry will continue to be linked fairly closely to developments in the U.S. market. Thus it can be expected that capacity utilization of Canadian potash mines, now around 73 percent, will continue to remain low, and that "excess productive capacity principally in Canada will remain a market constraint until the early 1990s."[26]

The Canadian potash industry may have been going through some rough times in the late 1980s, but compared with the fortunes of the U.S. potash producers, Canada's companies would seem to have had little to complain

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[25] "North American Sales Weak, but Offshore Market Buoyant," *Phosphorus & Potassium*, no. 150 (July/August 1987), pp. 11-12. By the mid-1990s it is expected that the U.S. market will account for only 50 percent of Canada's potash exports. Interview, Ottawa, 8 June 1989.

[26] G.S. Barry, "Potash," in *Canadian Minerals Yearbook 1986: Review and Outlook* (Ottawa: Energy, Mines and Resources Canada, 1987), p. 49.1.

about.[27] Until the past year and a half, the U.S. potash industry, most of which is located in New Mexico, looked to be a very endangered species. Over the dismal two-year period from 1984 to 1986, both employment and revenues declined precipitately, the former by 23 percent and the latter by 50 percent.[28] So bleak did the domestic industry appear that the former president of the Fertilizer Institute, Ed Wheeler, could remark in 1987 that "U.S. potash over the next 25 years will, in the main, disappear without a whimper."[29] If market forces were all that mattered in U.S. trade policy, perhaps this prediction could have stood the test of time better than it has; in reality, whatever the long term might hold for the New Mexico potash mines, their immediate prospects today look considerably brighter than they did two years ago, and this because some of their political protectors have been doing anything but whimpering!

In the following section, we examine the politics of the recent dumping case, beginning with the events of 1986 that first raised a cloud of suspicion that protectionism might once again interfere with market forces. In that section, we take the story up through the critical moment in August 1987 when the Department of Commerce made its preliminary determination that Canadian producers had been dumping in the U.S. market, and proceeded to set dumping margins that exceeded the expectations of even the New Mexico producers. But before moving on to this phase of the potash war, we think it appropriate to note one very important consideration regarding the New Mexico potash producers, their ore grade. As the subject of relative ore grades in New Mexico and Saskatchewan will come up again in our chapter 4 on uranium, it is important that the reader understand that the single biggest handicap U.S. potash mines face in competing with Canadian ones is a natural, not a political, one.

Although there is a widely held view in the United States (as we noted in our introductory chapter) that foreign competitors must invariably resort to unfair trading practices to displace U.S. producers in the latter's home market,

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[27] For an analysis of the prospects at mid-decade of the Canadian and world potash industries, see Douglas A. Karvonen, "The World Potash Industry - Changes in Supply and Demand," in *Structural Changes in the World Mineral Industry: Implications for Canada*, ed. M.J. Wojciechowski (Kingston, Ontario: Centre for Resource Studies, 1986), pp. 67-82.

[28] ITC, "Potassium Chloride," pp. 6-7. More than 80 percent of U.S. potash production is accounted for by New Mexico.

[29] Wheeler, "Next Twenty-Five Years," p. 23.

as far as the commodities we examine in this book are concerned, there really is little substance to the allegation. Ore-grade differentials are especially compelling in the case of uranium, but even in potash the degree of difference between Saskatchewan and New Mexico deposits is substantial. For example, in 1985 the New Mexico ores averaged 13.3 percent K_2O, compared with a Saskatchewan average in the vicinity of 23 percent. On the assumption that other factors of production are reasonably equal between the two areas, then ore grade can make a significant difference in relative production costs between New Mexico and Saskatchewan. Ten years ago a World Bank study of the international potash industry concluded that Saskatchewan costs of production, at the mining level, were only half those of New Mexico, and one can imagine that the spread would have increased somewhat between the two areas over the past decade.[30]

Thus it is against this 1986/87 backdrop of a declining U.S. potash industry, caught between the Scylla of a depressed domestic agricultural sector and the Charybdis of a low-cost, expansionary Canadian potash industry, that one must assess the antidumping suit filed against eight Canadian companies.

The Antidumping Suit, Round I: The Preliminary ITC and Commerce Determinations

The opening salvos in the bilateral potash war were officially fired on 10 February 1987, when two U.S. companies with operations in Carlsbad, New Mexico, filed an antidumping petition with the Commerce Department and the ITC. The petitioners were Lundberg Industries, of Dallas, and New Mexico Potash Corporation, of Memphis. Unofficially, the battle over potash had begun the year before, when New Mexico's influential Senator, Peter Domenici, at the time Chairman of the Senate Budget Committee, managed to extract from the U.S. Secretary of Commerce, Malcolm Baldrige, a commitment to "expedite" any antidumping suit brought against Canadian producers. Domenici, who was at the same time in the midst of a battle to secure protection from imports for his state's uranium producers, was keenly aware that the Canada-United States bilateral trade negotiations, which were soon due to commence, would serve as an excellent opportunity for him to try

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[30] Interview, Washington, 21 May 1986. For the World Bank survey, see World Bank Staff Working Paper no. 293, "World Potash Survey" (Washington, 1978).

to score some points against Canadian interests that, he was sure, were decimating U.S. companies by predatory trading practices. In a letter of 10 April 1986 to Robert Horton, the Director of the U.S. Bureau of Mines, the Republican Senator requested that the Bureau prepare a report on both potash and uranium, with special emphasis upon the likely effect that a Canadian-American Free Trade Agreement might have on U.S. producers of these commodities. Domenici asked that this impact analysis be completed as soon as possible, and his expectation was that the results would likely complicate the work of Canadian free-trade negotiators.[31]

The commitment from the Secretary of Commerce was not to self-initiate an antidumping petition; Commerce could have done this, and in so doing would have saved the petitioners some legal expenses, which can run as high as $200,000 in an antidumping case. Instead, Baldrige agreed to make technical assistance available to the New Mexico producers in their effort to draft their petition (a service that both Commerce and ITC routinely make available to potential petitioners). More significantly, the Commerce Secretary pledged that he would expedite any petition filed by the New Mexico interests; this meant that Commerce would give such a petition high priority, and would process it within a shorter period of time than is normally the case. Why should the Secretary of Commerce, a loyal lieutenant of a President whose commitment to free trade was doubted by few in Washington, agree to such an undertaking with one of the high priests of managed trade in the Congress? It seems that necessity and not desire swayed Baldrige, for as one Washington potash specialist explained: "Domenici was holding the tax-reform bill hostage. He said he was going to tack onto it his potash proposal." (The Senator's "potash proposal" would have mandated a renewal of assurances given by Canada in the 1969 antidumping case, and for good measure would have required that antidumping duties be placed on Canadian potash until the Commerce Department could be shown that Canada was not dumping.) So as not to delay any further the tax bill, Baldrige agreed to expedite.[32]

The ITC preliminary determination came as no surprise to those who knew how this stage of the Commission's efforts in antidumping cases normally developed: on 23 March 1987 the Commissioners, by a vote of five to none, ruled that there was "a reasonable indication that an industry in the United

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[31] Interview, Washington, 20 May 1986.

[32] Interviews, Washington, 20 and 22 May 1987, 13 June 1989.

States is materially injured, by reason of imports of potassium chloride from Canada that are alleged to be sold at less than fair value."[33] The Commissioners based their determination on three indicators: the poor performance of the domestic industry; the high degree of market penetration attained by Canadian imports; and the evident adverse effect these imports were having on prices for domestically produced potash.[34] Despite this finding, the mood in Canada remained reasonably optimistic, not only because ITC positive injury determinations were considered to be the norm, but also (and mainly) because Canadian producers were fairly certain that subsequent stages of the case would recognize that it was comparative advantage, not LTFV, that was causing the U.S. industry so much difficulty - and comparative advantage, or so it was thought, would be bound to win out in the end. An editorial in a major Saskatchewan newspaper reflected this mood of confidence when it stressed the necessity of resisting the temptation to strike a negotiated settlement, as had been done in the softwood-lumber countervailing duty case: "Any cave-in or concession on the potash front at this point would be premature and ill-advised. Despite a first-round setback, this is an issue on which Canada can come out a winner."[35]

By the time the second of the preliminary determinations was made - that of the Commerce Department - the tone of Canadian editorialists and politicians would change markedly. That determination was issued, after two postponements, on 20 August 1987, and to the Canadian industry it was shocking. Although the petitioners had been arguing, on the basis of data supplied by the U.S. Bureau of Mines, that a dumping margin of 42.86 percent should be assessed against Canadian shipments, the Commerce investigators actually hit three Canadian companies with margins above 50 percent. As table 6 indicates, the dumping margins assessed against Canadian firms varied enormously, from a low of about 9 percent to a high of more than 85 percent.

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[33] "USITC Makes Preliminary Antidumping Determination on Potassium Chloride from Canada," United States International Trade Commission *News*, (Washington, 23 March 1987). One of the commissioners, Alfred Eckes, was quoted after the decision as saying that between 90 and 95 percent of ITC preliminary injury determinations are affirmative. Joan Crockatt, "US. Potash Firms Win First Round," *Star-Phoenix* (Saskatoon), 24 March 1987. p. 1.

[34] ITC, "Potassium Chloride," pp. 1-3.

[35] "Potash Trade Clash No Cause to Cave In," *Leader-Post*, 25 March 1987, p. A6.

Table 6

Dumping margins assessed by U.S. Commerce Department in 1987 (percent)

Canadian Company	Margin
Potash Corporation of Saskatchewan (PCS)	51.90
International Minerals and Chemical Corporation (IMC)	9.14
PPG/Kalium (Kalium)	29.67
Central Canada Potash (CCP)	85.20
Potash Company of America (PCA)	77.44
All Others	36.62

Source: U.S. Department of Commerce, International Trade Administration, Import Administration, "Potassium Chloride from Canada: Preliminary Determination of Sales at Less than Fair Value" (Washington, 24 August 1987), pp. 13-14.

In reaching this preliminary determination, the Commerce investigators studied sales data for the period 1 September 1986 through 28 February 1987. The data were supplied both by the petitioners and by five of the Canadian companies: PCA, PCS, CCP, Kalium, and IMC. Proceeding largely (though not entirely) on the basis of constructed value, and making a series of adjustments to the data they were supplied, the investigators directed the U.S. Customs Service to require that a cash deposit or bond be posted, equal to the amount of its dumping margin, on each firm's shipments to the United States, until further notice. At the same time, Commerce notified the ITC of its determination, and announced that its own final determination would likely be made by 3 November 1987.[36]

The Commerce Department would not, however, make a final determination; nor would the ITC. Instead, the preliminary finding of dumping galvan-

[36] ITC, "Potassium Chloride," p. A4; U.S. Department of Commerce, International Trade Administration, Import Administration, "Potassium Chloride from Canada: Preliminary Determination of Sales at Less than Fair Value" (Washington, 24 August 1987), pp. 13-14.

ized the Saskatchewan government, leading it to take some forceful measures that required the collaboration of the once-disdained PCS.

The Antidumping Suit, Round II: Saskatchewan Retaliates

The news of the Commerce preliminary finding spread quickly to New Mexico and Saskatchewan, where it elicited radically contrasting responses. In New Mexico, the good news was brought from Washington by none other than Peter Domenici himself, who informed the first-ever New Mexico Potash Conference, fortuitously gathered at Carlsbad on 20 August, that "the time has come for Canada to come to its senses." Jubilant indeed was the local response to the Commerce decision on what Domenici would subsequently call that "historic day" for Carlsbad.[37]

Jubilation was hardly the word to describe the reaction in Regina. Dismay, shock, outrage - these are words that better capture the mood, both of the Saskatchewan government and of the province's private sector. Speaking to a premiers' conference in Saint John, New Brunswick, a week after the Commerce finding was announced, Premier Grant Devine promised to retaliate with measures "as powerful as you've seen in recent Canadian history."[38] Among the steps that were being mooted in Regina was an embargo on potash shipments to the United States. But on reflection the government decided against taking this drastic measure, although it insisted that neither would it seek a negotiated settlement with the United States, as the opposition New Democratic Party was demanding. Back in Saskatchewan, and with a month to dwell on the Commerce determination, Premier Devine said of it: "We think it's wrong, that it's wrong-headed, that it's fraudulent, that it is very much unfair - very much unfair." Turning his wrath to targets nearer to hand, Devine then unleashed some vituperation upon the opposition benches, whom he accused of playing into the hands of U.S. protectionist forces. "The Senator from New Mexico quotes the NDP time and time and time and time

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[37] Curtis C. Wynne, "Ruling Hikes Import Potash Prices," *Current-Argus* (Carlsbad, N.M.), 21 August 1987, p. 1; "A Cool Breeze on a Hot Day," ibid., 23 August 1987, p. 6.

[38] Julian Beltrame, "Saskatchewan Will Be First to Follow Through on Threat," *Telegraph-Journal*, 29 August 1987, p. 15.

again ... They quote them in Congress, and they quote them right through the halls of Congress in Washington."[39]

By the time the Premier was making these remarks, his advisors had already hit upon the strategy that would lead, interestingly, to just the sort of solution that Devine was denouncing the NDP for suggesting, a negotiated settlement. Given the peril associated with the Commerce Department action, which one respected mining journal feared would "all but devastate the potash industry in this country,"[40] the Saskatchewan government had little choice but to react in a forceful and imaginative way. In its retaliation, the government relied on two principal levers: bold legislation that would tightly control potash production in the province, and a unilateral price increase by the company deemed to have "market power," the Crown-owned PCS.

Addressing a conference organized by the Fertilizer Institute in New York City in mid-September, Devine outlined his strategy. Lamenting that U.S. farmers would have to "pay through the nose" as a result of the Commerce determination, he stated that Saskatchewan would not hesitate to use its excess capacity to assert leadership in the world potash market. Cautioning producers in other countries (as well as in New Brunswick) not to try to increase their share of the U.S. market at Saskatchewan's expense, he observed that "you can manage [supply] both ways. You can close the tap, or you can open the tap... [W]e're quite prepared to do both."[41]

The first step in the effort to assert market leadership had already been taken on 1 September, when Bill 36, the Potash Resources Act, was introduced in the Saskatchewan Legislative Assembly. This bill would give the provincial government sweeping powers to control production from the province's 11 potash mines, if necessary by the imposition of fines of up to $1 million against companies exceeding their quotas.[42] The bill, which Energy and Mines Minister Patricia Smith curiously insisted was not being introduced as a direct response to the Commerce Department ruling, managed to attract,

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[39] Legislative Assembly of Saskatchewan, *Debates and Proceedings*, 24 September 1987, p. 2808. (Hereafter cited as Saskatchewan *Hansard*.)

[40] "Double Whammy in Rail Strike, Potash Duty," *Northern Miner*, 31 August 1987, p. 4.

[41] Martin Mittelstaedt, "Devine Takes Saskatchewan Potash War to U.S.," *Globe and Mail*, 15 September 1987, p. B12.

[42] Patrick Whiteaway, "Saskatchewan Retaliates," *Northern Miner Magazine*, November 1987, p. 42.

initially, a rather odd collection of opponents within the province.[43] Some in the private sector were resentful of the government's arrogating to itself so much authority over the mining industry. John Gordon, vice president of Noranda Minerals, whose Central Canada Potash subsidiary had been hit with the steepest dumping margin (85.2 percent), said that he had "expected more" from the government, and that Bill 36 constituted a "retrograde step."[44] Some editorialists worried that the premier was simply playing "the mouse that roared," and that his attempt to exert market dominance would backfire, as wily competitors abroad would quickly steal Saskatchewan's share of the U.S. market. "What is to say," wondered one nervous writer for a major Saskatchewan daily, "that North American potash users, over time, won't ... tap new sources beyond Saskatchewan?"[45]

Perhaps the oddest criticism of all came from the NDP. The party's energy critic, Herman Rolfes, denounced Bill 36 as "the single most pervasive, heavy-handed and insidious regulatory bill ever introduced in this legislature and I think in this country."[46] And Roy Romanow, who would shortly become leader of the opposition, said with no evident sense of embarrassment, despite his own party's views on the merits of the market, that the bill was "probably the most massive intervention in the free market-place of any legislation in the history of Saskatchewan."[47]

A sojourner in the province at the time might have been forgiven if he or she had mistaken Saskatchewan for Lewis Carroll's Wonderland, because events were definitely becoming "curiouser and curiouser!" What, to begin with, was one to make of the Commerce Department's increasing the price of fertilizer for millions of U.S. farmers to protect some 1000 jobs in the New Mexico potash industry? And were the devout free-enterprisers in the Saskatchewan cabinet really serious about taking over the province's third-ranking industry? Finally, how was one to fathom the crocodile tears now

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[43] For Smith's claim, see Saskatchewan *Hansard*, 31 August 1987, p. 2164.

[44] Joe Knycha, "Potash Companies Disappointed, *Star-Phoenix*, 2 September 1987, p. D3.

[45] "Finding the Right Weapon for Use in the Potash Wars," *Leader-Post*, 3 September 1987, p. A6. Also see Geoffrey York, "Saskatchewan Has a Limited Arsenal in Potash War with the United States," *Globe and Mail*, 19 September 1987, p. D2.

[46] Randy Burton, "Potash Bill Leaves Uncertainty: Rolfes," *Star-Phoenix*, 4 September 1987.

[47] Saskatchewan *Hansard*, 17 September 1987, p. 2658.

being shed by the provincial NDP over the battering being taken by the private sector at the hands of big government? "If there is any conclusion that can be drawn from this mess," noted one writer, "it is that narrow political interests in the United States have manufactured an economic crisis in this province."[48]

An economic crisis it certainly appeared to be, but at least the provincial government's response did not seem likely to trigger a legal crisis as well, as a similar provincial move had done back in 1969, under conditions that were not unlike those of 1987. Then, as in the later year, the government in Regina attempted to nullify the threat of antidumping duties by undertaking pro-rationing and interfering with pricing mechanisms. In that earlier instance, the Liberal government of Ross Thatcher, after consultations with New Mexico's governor, David Cargo, implemented a plan that would limit Saskatchewan's exports to the United States, establish production quotas for the province's mines, and set a floor price of $33.70 a ton for their potash. Although that scheme has been seen as bringing stability to the volatile potash market, and even enhancing the rents accruing from potash production, its legality was challenged by one company, Central Canada Potash. The 1969 provincial legislation, the Potash Conservation Regulations Act, was eventually declared *ultra vires* in 1978, on the grounds that the setting of a floor price constituted an infringement upon interprovincial and international trade.[49]

Although commentators have remarked upon the similarities between the 1969 and 1987 events, there were two important differences.[50] In the first place, the constitutional context is vastly altered today, as compared with 1978; for the Constitution Act of 1982 appears to accord more latitude to provincial governments in matters of natural resources than did the BNA Act. Section 92A of the Constitution Act dispels some of the ambiguity attached to the earlier Act by stipulating that provincial legislatures have the power to enact legislation involving the "development, conservation and management of

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[48] Dale Eisler, columnist in *Leader-Post*, 3 September 1987.

[49] Olewiler, "Potash Corporation of Saskatchewan," pp. 21-23; "New Mexico Must Co-operate: Ex-Governor," *Star-Phoenix*, 3 September 1987, p. A12. For an analysis of the 1969 events, see John Richards and Larry Pratt, *Prairie Capitalism: Power and Influence in the New West* (Toronto: McClelland and Stewart, 1979), chapter 8: "Boom and Bust in the 'New Saskatchewan'."

[50] Dale Eisler called the 1987 situation "almost identical" to that of 1969. See U.S. Potash Duties Spark Tory Response," *Winnipeg Free Press*, 24 September 1987, p. 7.

nonrenewable resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom." This section was in large measure the product of two Western premiers, Allan Blakeney of Saskatchewan and Peter Lougheed of Alberta, each of whom had been troubled by the Supreme Court's 1978 decision on the Potash Conservation Regulations Act.[51]

The second difference is that the 1987 measure set no floor price for potash. Instead, the price of potash would be elevated through the Crown-owned PCS, which asserted market leadership early in September by raising its price by $35 (U.S.) a metric ton, to $93.[52] This 60-percent increase was calculated on the basis of the average of the dumping margins assessed by the Department of Commerce against all the Canadian companies. Even with the higher price, which some other companies as well as foreign producers matched within days, PCS was still going to receiving slightly less for its potash in the U.S. market than before the Commerce decision. Because it faced a dumping margin of 51.9 percent, some $48 of the new $93 price would go to the U.S. Treasury, with PCS keeping $45. This represented a shortfall of $13 over what the company had been receiving the month before. Even harder hit, of course, would be the two companies with the stiffest margins, CCP (85.2 percent) and PCA (77.4 percent). On the assumption that they were going to respect the new price, the biggest gainers from the arrangement would be the companies with the lowest dumping margins, IMC (9.14 percent) and Kalium (29.7 percent). Companies in the 36.6-percent dumping bracket - Cominco, Saskterra, and Potacan of New Brunswick - were expected to be in about the same position as before the dumping margins were set.[53]

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[51] "Bill Uses Constitutional Change," *Star-Phoenix*, 3 September 1987, p. A12; Dale Eisler, "Potash Action Seen to Comply with Constitution," *Leader-Post*, 2 September 1987, p. A4. For an analysis of competing federal and provincial competencies in resources trade, see Constance D. Hunt, "Jurisdiction over Trade in Natural Resources in Canada," in *Trading Canada's Natural Resources: Essays from the Third Banff Conference on Natural Resources Law*, ed. J. Owen Saunders (Toronto: Carswell, 1987), pp. 253-79.

[52] "Randy Burton, "PCS Responds to Tariffs by Hiking Prices to U.S.," *Star-Phoenix*, 5 September 1987, p. A7.

[53] "Price Hike Won't Totally Offset Dumping Penalties," *Star-Phoenix*, 19 September 1987, p. B14; "Potash Limits Near as World Prices Rise, *Winnipeg Free Press*, 12 September 1987, p. 20.

The Devine government was gambling not only that its tough new measure would incur no legal difficulties, but also that it would be able to count upon producers outside the province not to attempt to take market share in the United States away from the Saskatchewan companies. On both counts, the gamble seems to have been a judicious one. Moreover, the government was counting upon the new higher prices having an impact upon the potentially most important ally the province could have in its battle against U.S. protectionists, the consumer. In this case, the consumer meant the millions of farmers who would suddenly find themselves paying much more for their fertilizer than they had the planting season before. As one editorialist put it, "One message Premier Devine is attempting to get through to U.S. legislators, especially those who are in a protectionist mood, is that there are a lot more farmers in the U.S. than there are workers in the American potash industry."[54]

The potash bill, which was passed on 18 September, coupled with the price increase, did have the effect of awakening the hitherto somnolent U.S. farm lobby, which now swung into action to try to reverse the chain of events that had led to this further challenge to its economic interests. As we now relate, this awakening would have a bearing on the willingness of the petitioners and the Commerce Department to strike a negotiated end to the potash war.

The Antidumping Suit, Round III: The Road to the Negotiated Settlement

During a debate over Bill 36 in mid-September, Premier Devine appeared to be in a feisty mood, apportioning his invective between the opposition NDP (for what he considered to be their anti-Americanism, as well as for having created PCS in the first place) and the Americans (for trying to "intimidate" Saskatchewan). Feisty or not, he still could articulate the essence of the province's plan of action on potash, which was contained in the remark that U.S. farmers should not be "held ransom by one senator and two old worn-out potash mines in New Mexico."[55] Although the slumbering U.S. farmers had

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[54] "Getting the Mule's Attention," *Winnipeg Free Press*, 6 September 1987, p. 6.

[55] Randy Burton, "NDP Potash Buyout Caused Tariff: PCs," *Star-Phoenix*, 12 September 1987, p. A13.

yet to awake fully to the potential costs they would have to pay as a result of the antidumping petition and the Commerce preliminary determination, there were signs that, even as Devine was speaking, some in the United States were beginning to take his message seriously.

Among the first of the U.S. farm groups to react was the American Farm Bureau Federation, which on 11 September, 10 days after the first reading of the Potash Resources Act, wrote President Reagan, urging him to undo the dumping duty. "At a crucial economic time," stated this letter, "when U.S. farmers are trying to work back to market-based incomes, this U.S. trade intervention, if it becomes reality, will be moving in the opposite direction by raising farm costs, reducing income, and leading to calls for more government assistance."[56] It was a good theme to sound with the passionately free-market Reagan, but there was a hitch: there was no discretionary power that the President could wield, at least directly, to reverse the decisions that had issued from the "quasi-judicial" antidumping procedures of the Commerce Department and ITC. In this respect, a major distinction must be highlighted between the antidumping process and escape-clause cases; as we shall relate in the following chapter, the U.S. copper industry has been singularly unsuccessful in obtaining presidential backing in its two recent drives for import-relief under Section 201 of the Trade Act of 1974, notwithstanding a favourable outcome at the ITC.

Thus there was some merit in the claim made by one Commerce Department official that the ITA would not bow to political pressure, no matter from what quarter. Snapped Michael Ready, a Commerce import-compliance specialist: "Mr. Mulroney or what ever his name is can jump up and down all he wants: it won't make any difference....The Canadian producers hire lawyers. The American producers hire lawyers, and we see who wins." Even the intervention of the White House cannot reverse a Commerce Department ruling, claimed Ready, who quickly added, "I doubt whether Reagan knows what potash is, quite frankly."[57]

Whatever the extent of the President's knowledge of potash, there is a way for Executive discretion to be exercised, at least indirectly, even in such ostensibly non-discretionary procedures as antidumping suits. This inhered, as we stated earlier in this chapter, in the procedural avenue for suspending

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[56] Maureen Marud, "U.S. Farmers Denounce Potash Duties," *Star-Phoenix*, 16 September 1987.

[57] Murray Mandryk, "Forget About Potash Bill: Lobby Americans, NDP Says," *Leader-Post*, 3 September 1987.

an antidumping investigation, which itself would be dependent upon negotiations between the Commerce Department and the Canadian producers. During the 1969 antidumping case, there had been direct negotiations between Saskatchewan and New Mexico, but by 1987 such a bilateral course was held, in both Regina and Washington, to be potentially subject to censure under U.S. antitrust laws.[58] If there were going to be negotiations, there would first have to be some strong encouragement from the Devine government to the province's companies to seek a compromise settlement; and there would have to be some leverage that the province could bring to bear on the political process in the United States.

As well, there would have to be a willingness to negotiate on the part of the Saskatchewan government, even if it would not be a direct party to the talks. Initially, there was good reason to question whether the Saskatchewan government would be amenable to encouraging the province's companies to seek a negotiated settlement. Certainly the Premier had been highly critical of NDP calls for negotiations, calls that he argued played straight into the hands of Congressional protectionists like Domenici. But there is evidence that provincial officials, despite the Premier's public statements, had indeed been quietly investigating whether a compromise could be reached with the Commerce Department.[59] In support of this assertion is a remark made by provincial trade minister, Robert Andrew. When asked by opposition leader Allan Blakeney whether Regina should not be exploring a possible negotiated end to the dispute, Andrew replied that options were currently being studied.[60] This comment, made less than a week after the Commerce Department's preliminary determination, suggests that, its rhetoric aside, the government was willing to seek a compromise ending to the potash war.

But for a compromise to be reached, there would have to be some incentive to get the major players on the U.S. side to favour it. Senator Domenici, it could be argued, would have no reason to work for a settlement now that the Commerce Department had determined dumping to be taking place.

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[58] "Charles Childers, President and Chief Executive Officer of Potash Corporation of Saskatchewan, Talks to *Fertilizer International*," *Fertilizer International*, no. 253 (September 1987), p. 35; Murray Mandryk, "Devine Says Potash Settlement Unlikely Now", *Leader-Post*, 24 September 1987, p. A4.

[59] Norma Greenaway, "U.S. Delays Final Ruling on Potash Until Early '88, *Globe and Mail*, 24 September 1987, p. B6.

[60] Saskatchewan *Hansard*, 26 August 1987, pp. 2069-71.

He seemed to be on a roll, and why should he desist from pressing his advantage on behalf of his constituents? The answer to this question, it turns out, was to come suddenly, and would take the form of some serious charges of impropriety, including misuse of pension funds, being made against one of the petitioners in the antidumping suit, Lundberg Industries. The details of the allegations need not concern us, but a few points warrant emphasis here. First and foremost is the existence of a Congressional stipulation to the ITC that, when it investigates injury, it must consider factors that could indicate the injury was not caused by imports. This Congressional injunction, issued in 1979, states: "Of course, in examining the overall injury being experienced by a domestic industry, the ITC will take into account evidence presented to it which demonstrates that the harm attributed by the petitioner to the subsidized or dumped imports is attributable to such other factors."[61]

Nineteen eighty-seven was not a good year for Lundberg Industries, notwithstanding its victory in the Commerce preliminary dumping investigation. Lundberg, which had purchased the Potash Company of America's mine near Carlsbad in late 1985, filed for bankruptcy under Chapter 11 of the Federal Bankruptcy Code in June 1987.[62] At first, there were some who thought the bankruptcy case would add further strength to Lundberg's antidumping petition: after all, what better evidence could one muster regarding injury than a bankruptcy case?[63] To be successful, antidumping suits must somehow link injury to imports, and the existence of such a link began to come into question, at least for Lundberg Industries, shortly after the Commerce ruling of late August. By early September, it was apparent that there were some fairly serious allegations about corporate malfeasance at company headquarters, allegations that prompted Domenici himself to respond. The allegations concerned the former owner of Lundberg Industries, Tom Lundberg, who was suspected of a host of wrongdoings, including misappropriation of pension funds.

Domenici, although clearly disturbed about the possibility that the Carlsbad miners' pensions were being misused, was also worried about the potential havoc that the developing Lundberg scandal could wreak on the antidumping

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[61] ITC, "Potassium Chloride," p. 8.

[62] Curtis C. Wynne, "Skeen Asks PBGC Pension Protection," *Current-Argus*, 6 September 1987, p. 2.

[63] *Fertilizer Focus*, August 1987, p. 10.

investigation. "What concerns me, " he wrote in mid-September, "is how the Canadian companies will react to the bankruptcy....As a community, we cannot leave these issues unresolved so that Canadians might argue that it was alleged mismanagement, rather than their proven illegal dumping activities, that was the cause of our trade problem."[64] But events would unfold in a way not likely to enhance the New Mexico companies' antidumping suit, for by the end of the year a total of 29 felony charges would be filed against Lundberg and eight other defendants, and among the various criminal charges were fraud, embezzlement, and racketeering. The Canadian companies were not slow to observe that these developments, which related to activities dating from November 1985, were likely to make it harder for the ITC to make a final injury determination.[65]

If criminal allegations were troubling the New Mexican interests, difficulties of another sort were beginning to make themselves apparent in the Executive branch. By the early autumn, the U.S. farm lobby, which included some influential Senators of its own, had begun to pressure the White House, the Commerce Department, and even the ITC to put an end to the potash war and restore free trade in this essential commodity. Some farmers were at last beginning to see the gravity of the challenge, which in the words of one reporter they considered to be "second only to the embargo on grain sales to the Soviet Union in terms of impact on American agriculture." Especially hard hit, it was thought, would be the corn growers. According to Alan Tank, an assistant vice-president of the U.S. Corn Growers' Association, the dumping duties would likely spell the difference between profit and loss for this group of farmers.[66] Said the president of the South Dakota Corn Growers' Association, following a late-September visit to the state by Premier Devine, "We're going to fight this thing without our government. We need Canada and Canadian potash." This official, Mark Rogen, estimated that members of his association would each have to pay $540 a year more for fertilizer if the duties were not removed.[67]

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[64] "The People Speak," *Current-Argus*, 17 September 1987.

[65] Curtis C. Wynne, "Lundberg Arraignment Wednesday," *Current-Argus*, 22 December 1987; Murray Mandryk, "Former U.S. Mine Owner Indicted," *Leader-Post*, 5 January 1988.

[66] Deborah Sprout, "Potash Duties Vex U.S. Farmers," *Western Producer*, 17 September 1987, p. 1.

[67] Murray Mandryk, "Devine Tells Americans Protectionism is Costly, *Leader-Post*, 22 September 1987, p. B7.

Soon other, equally worrisome, estimates of the costs of protectionism would begin to circulate through the U.S. farming community, which was in a mood to believe the worst about coming price increases in fertilizer. Early in October the American Farm Bureau predicted that fertilizer prices would jump by an incredible 80 percent - from $107 a ton to $195 - as a result of the Commerce Department finding. Aggregate production costs of corn, wheat, and soybeans were projected to rise some $300 million in 1988, with Illinois and Iowa especially affected, as the leading corn-producing states.[68] Working assiduously to foster the starkest recognition of the costs of protectionism was PCS, whose lobbying efforts against the Commerce preliminary determination included a mailing to 2,000 of the company's U.S. customers, explaining why the price of potash must go up. PCS president Charles Childers noted that "we are like ants, very diligently going out and making sure that the media, our customers, dealers and the various farm organizations know what is going on and who to contact if they wish to protest."[69]

It did not take very long for U.S. farming interests to direct their grievances through the appropriate political channels. One letter, sent in early October by Senators Robert Dole, Paul Simon, and David Durenberger to ITC chair Susan Liebeler, warned that the dumping duty would trigger an "OPEC-type cartel" in potash. The Senators cited the Potash Resources Act as evidence that a cartel was in embryo, brought upon U.S. farmers by the U.S. government itself. "It seems pretty farfetched," noted a legislative assistant to Durenberger, Alexander Polinsky, in reference to the mandate of the ITC, "that the domestic industry has suffered because of Canada." But ITC Secretary Kenneth Mason held his ground and defended his agency's preliminary injury determination, reiterating that political pressure would not sway the ITC.[70]

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[68] Mandryk, "No Solution Yet in Potash Case," *Leader-Post*, 6 October 1987. In 1986 eight midwest states accounted for two-thirds of America's entire potash consumption. With their percentage share of consumption given in parentheses, they were Illinois (15), Iowa (10), Ohio (9), Indiana (9), Minnesota (7), Wisconsin (6), Missouri (5), and Michigan (5). ITC, "Potassium Chloride," p. A10.

[69] Maureen Marud, "PCS Takes Tariff Battle to American Farmers, *Star-Phoenix*, 17 October 1987.

[70] Murray Mandryk, "Some Senators in U.S. Oppose High Potash Tax," *Leader-Post*, 9 October 1987, p. B9.

Political pressure might not alter the position of the ITC, but over at the Commerce Department, one could not be so certain that pressure would have no effect. By the middle of October, with the farm lobby now out in full force, attention began to focus on the Commerce finding. Moreover, the White House began to receive strong signals of Congressional displeasure over the dumping duties, and one letter written by 12 Senators to the President drew his attention to the "devastating impact on American farmers" of the Commerce Department action.[71] As the autumn wore on, it was becoming evident that a negotiated settlement to the dispute looked more and more likely, and Saskatchewan Minister of Energy and Mines Smith was not alone in attributing the conciliatory mood in Washington to the efforts of the huge U.S. farm lobby.[72]

Conclusion: The Compromise Agreement

In early December, five Canadian potash companies and the U.S. Department of Commerce initialled an agreement in principle that would pave the way to the suspension agreement of the following month. The Commerce Department, for its part, would suspend the duties for a month, on the condition that the Canadian producers agreed not to sell in the U.S. market at LTFV. Should a suspension agreement not be in place by the second week of January, then Commerce was expected to announce its final determination that Canadian potash was being dumped in the United States.[73] This draft agreement gave negotiators for the companies and the Commerce Department a month to work out the details of the suspension agreement, which was achieved, as noted earlier, on 8 January 1988, as the deadline for the Commerce final determination approached. Although some in the U.S. farming

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[71] Maureen Marud, "Potash Duties 'Devastating' U.S. Farmers," *Star-Phoenix*, 15 October 1987.

[72] Murray Mandryk, "Potash Talks 'Could Go Down to the Wire,'" *Leader-Post*, 12 December 1987.

[73] "Americans Suspend Duties in Hopes of Pact on Potash," *Winnipeg Free Press*, 11 December 1987, p. 11; "Potash Price Pact Planned to Settle Dumping Dispute," *Globe and Mail*, 12 December 1987; "Agreement Signed to Delay Potash Duties," *Potashville Miner-Journal*, 16 December 1987; "Potash Firms Agree to Price Move," *Telegraph-Journal*, 12 December 1987, p. 8.

community wanted the Canadian companies to see the petition through the remaining procedural hoops (on the assumption that either Commerce or the ITC, or both, would fail to produce a final affirmative determination), elsewhere there was a palpable sense of relief that the truce had been achieved.[74]

The major parties to the dispute were quick to claim victory. Ted Kassinger, who represented the petitioners, called the negotiated settlement a "vindication" of the New Mexican position, a view shared by Senator Domenici, who thought the settlement was "great news for Carlsbad." The mayor of that city, Bob Forrest, enthusiastically bestowed his thanks on the petitioners' champions in their battle, especially Domenici and his staffers, and the New Mexico state legislature, which had raised $270,000 to defray the legal expenses associated with the suit. Forrest said the suspension agreement should preserve the 1700 jobs at the five remaining operating mines in the region, although he was less confident that the 2200 jobs lost to "unfair foreign competition" could be restored.[75] Domenici was sure the agreement could be made to work, and cited both the pledge made by Secretary of Commerce C. William Verity to monitor it closely and the existence of the Potash Resources Act, which could be counted on to provide Regina with leverage over the province's companies.[76]

In Canada, the accord was equally well-received. One Canadian government official, speaking to the press on the condition he not be identified, said that the potash producers were "extremely happy with the agreement." Indeed, even before the suspension agreement had been signed, in the wake of the

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[74] Prominent among U.S. farm representatives to resent the suspension agrement was Paul Drazek, assistant director of the American Farm Bureau, who thought the Canadian companies should have resisted a compromise. On the other hand, Michael Hall, executive vice-president of the National Corn Growers' Association, thought that the deal was the best that could have been arranged, and while potash prices were going to rise as a result of it, 1986 prices had been unrealistically low in the first place. Bruce Johnson, columnist in *Leader-Post*, 9 January 1988; Murray Mandryk and D'Arce McMillan, "U.S. Farmers Split on Potash Pact," *Leader-Post*, 9 January 1988, p. A3.

[75] By mid-1989 there were 2000 miners at work for the state's six potash companies. Interview, Washington, 13 June 1989.

[76] "U.S. Potash Producers Pleased with Pact," *Star-Phoenix*, 8 January 1988, p. A8; "Officials Laud Historic Potash Pact," *Current-Argus*, 8 January 1988; Curtis C. Wynne, "Canada Looks for Settlement," *Current-Argus*, 10 December 1987. Although it remains on the books, this legislation has not needed to be utilized.

initialled draft agreement, some Canadian producers were quite open about their enthusiasm for a negotiated settlement. Probably typical of the industry's response was PCS president Childers' comment, "We're very happy with this development." Echoing this view was an observation made by David Sanderson, assistant manager of Central Canada Potash: "It's certainly an admission by Commerce that they are starting to see the whole thing is quite ridiculous. Eventually, even logic has to prevail over U.S. trade law."[77]

Thus it seemed, in the aftermath of the suspension agreement, that the impossible had been achieved: a deal that satisfied the New Mexico potash industry and its Congressional protectors, the Saskatchewan industry and its political patrons, the Department of Commerce, and (although its role was marginal) the Canadian federal government. The only major group not certain that it had come out with a victory, of course, was the U.S. farm lobby; but even it was acquiescent, in spite of the new reality of higher potash prices. The reason was that the mandated higher prices would still be lower than the price of Canadian potash to which a hefty dumping duty was attached. The terms of the agreement would still permit Canadian companies to sell in the United States at LTFV, but not by too much. As Childers put it, the agreement "allows us to sell at a price actually a little below what the law would call dumping." Specifically, the Canadian companies could sell at LTFV by no more than 15 percent of the dumping margin that had been assessed against them back in August. In the case of PCS, whose margin had been set at 51.9 percent, this meant that prices greater than about 7.8 percent below "fair value" could escape reprisals.[78]

Not without some justification was the agreement lauded as a "win-win" arrangement, for as one editorialist noted, "the negotiations to settle the New Mexico complaints have resulted in Saskatchewan selling as much potash in the U.S. as it did before, but at a higher price."[79] The North American

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[77] Murray Mandryk, "Potash Dumping Case Suspended," *Leader-Post*, 11 December 1987.

[78] Maureen Marud, "Removal of Duty Unlikely to Lower Potash Prices," *Star-Phoenix*, 8 January 1988.

[79] "A Good Deal on Potash," *Winnipeg Free Press*, 11 January 1988, p. 6. For a similar editorial assessment, see "Optimism for Potash Industry," *Star-Phoenix*, 9 January 1988, p. A4. It appears that there has been a slight decline, in the range of five percent, in Canada's share of the U.S. market, due to offshore producers putting more tonnage into the United States. But this offshore penetration has been compensated for, in volume terms at least, by Canadian shipments to non-U.S. markets. Interview, Ottawa, 8 June 1989.

potash industry, to be sure, will continue to suffer from the combined effects of depressed markets and overcapacity, and there is no guarantee that non-Canadian producers will not eventually succumb to the temptation to try to grab a greater share of the U.S. market. Nor, for that matter, can one even be sure that the agreement itself will remain in effect for the stipulated five-year period; one consequence of the impending privatization of PCS, on the assumption that the company is broken up, could be a slackening of the discipline now being provided by the Crown corporation's role as balancing agent in the market.[80]

Nevertheless, the suspension agreement does seem to have resulted in perhaps as equitable a solution as one is likely to find in the politically charged arena of U.S. trade law and administration. We have already noted the major factors that disposed the various parties to the dispute to seek a compromise end to the potash war. Similarly, we have observed that the affair demonstrated once again the manner in which the "principle of the opposite effect" can unexpectedly become manifest in ways no one could have predicted. For the moment, perhaps the last word on the potash war of 1986-88 should rest with a percipient editorial writer for the Regina *Leader-Post*, who in applauding the suspension agreement also observed, with a touch of whimsy, that "few will suggest that the suspension accord and what preceded it represent the free market's finest hour."[81]

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[80] Remarked one U.S. government official, "I can see this [i.e. the antidumping process] happening again in five years." Interview, Washington, 12 June 1989.

[81] "Potash Deal Allows Good Sense to Prevail," *Leader-Post*, 9 January 1988.

4. The Case of Copper in U.S. Trade Law and Policy

Introduction

In January 1984 the U.S. International Trade Commission commenced an investigation under Section 201 of the Trade Act of 1974, to determine whether imports were inflicting serious injury upon U.S. copper producers. The investigation followed upon the filing of a petition by 11 domestic companies, in a case that had potential adverse implications for Canadian exporters of copper to the U.S. market. By the end of June the Commissioners had completed their work, making a recommendation to the White House that import relief be granted the petitioners. It was the second time in less than a decade that the ITC would make such a recommendation to a President; in neither instance, however, did the copper industry ultimately get what it was seeking.

During the most recent ITC investigation, into imports of unwrought copper, the main target of the U.S. industry's ire was Chile, which was held to be flooding markets with copper that - were its industry in private hands - would not have been brought into production during the depressed climate for this and other minerals at the time. The U.S. producers spent close to $1 million trying to win import relief, but they conceded that the remedies open to the ITC Commissioners to recommend, namely quotas or tariffs (or both), were not what they were really seeking; instead, they wanted the Reagan administration to negotiate a voluntary export restraint (VER) arrangement with Chile, in the hope that this would restore order in the marketplace. The U.S. producers had contemplated filing a countervailing duty (CVD) petition, but were hesitant to get ensnared in difficult definitional forays about the nature of subsidies. As well, they were not confident that, even had the Department of Commerce and the ITC investigations resulted in a subsidy margin being established against Chilean (and other Third World) producers, the margin would have been large enough to have done them much good. A Section 301 case was also contemplated, under a provision of the 1974 Trade Act intended to facilitate retaliation against unfair trade practices, but the

industry perceived this seldom-used option as, in the words of one company executive, "a joke."[1]

Thus, almost by default, the U.S. producers were left with the 201 process, even though they had not had success with this legal avenue in 1978. It was recognized that this process had a major drawback (in addition to the fact that the Commissioners had only the power to recommend, not impose, relief): the range of remedy, consisting only of the tariff or quota alternatives mentioned above, was not felt to be broad enough to accord meaningful protection. As this same official explained, "we were really after negotiations along the lines of VERs, but we *had* to argue that we wanted tariffs or quotas, for these were the only trade remedies available in a 201 case."

In its battle for import relief, the U.S. copper industry made two major errors. The first was to be taken by surprise by the level of opposition to their petition. No surprise was greater than finding Canada lined up implacably against the U.S. producers. "We thought the Canadians would be on our side," recounted the American executive. "It wasn't Canada that was our problem, it was Chile, and we tried to send them signals, to the effect that we really wanted VERs, and that Canada wouldn't be hit." The second error consisted in overlooking the possibility that other domestic industries would be trying for import relief as well in this, an election year, and that some of them (e.g. steel) might be better placed, in an electoral sense, to garner the necessary blessing from the administration. The U.S. copper producers calculated, mistakenly as it turned out, that the Reagan re-election drive would oblige the White House to grant import relief to assist the western copper-producing states. The reality was quite different: it was the midwestern steel-producing states, and the eastern footwear-manufacturing states that would get protection in that election year. "It came down to us versus steel, and the administration - bolstered by arguments from David Stockman - came out in favour of steel. They just took the western states for granted."

Since the unsuccessful 201 initiative, the U.S. copper industry has adjusted, often by downsizing, to competitive pressure from Chile and other producers. The industry seems to have lost its appetite for any further resorts to Section 201. However, there is a perception that the major source of the domestic producers' woes (to the extent they are currently experiencing any) is no longer Chilean "overproduction," but rather Canadian shipments of refined copper. Briefly, U.S. producers, somewhat dubious about the Free Trade

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[1] Interview, New York City, 30 December 1986. Material in this introductory section is drawn extensively from this interview with an executive of one of the major U.S. copper producers.

Agreement, have been pondering whether Canadian subsidies accorded for the purposes of pollution abatement, might have the effect of "unfairly" affecting U.S. producers. The experience of the lead/zinc industry is seen to be significant, for U.S. producers of those two minerals have for some time now been objecting to what they take to be excessive and damaging levels of subsidization being accorded by various levels of government in Canada.

Thus, for the moment, U.S. protectionist pressure in copper has both abated and changed its focus, the latter in two senses: the preferred means of import relief have been transferred from Section 201 to a possible CVD petition; and the target of U.S. protectionist sentiment has shifted, so that it is no longer Chile and other LDCs, but increasingly a country such as Canada that attracts their (admittedly attenuated) interest. Should U.S. copper producers again fall upon hard times, it can be expected that their attention might once more be riveted upon the quest for import relief. In the following two sections, therefore, we explore in some detail those aspects of U.S. trade law and administration that either have had or might have potential relevance to Canadian copper producers. We begin our examination with the Section 201 (or "escape clause") process, and continue with an exploration of the countervailing duty procedure.

The Escape-Clause Laws

The escape-clause laws of the United States are set out in Section 201 of the Trade Act of 1974, as amended by the Trade Agreements Act of 1979, and are administered by the United States International Trade Commission. The purpose of the escape clause is to protect U.S. industries from serious injury from fairly traded imports and to "facilitate orderly adjustment to import competition." This goal is achieved by granting relief when imports are entering the country "in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported articles."[2]

Upon the receipt of a petition, the ITC is required to publish notice in the *Federal Register* of a public hearing on the matter, and an investigation is begun. The investigation is conducted by the ITC staff and relevant informa-

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[2] International Trade Commission, "Unwrought Copper," Report to the President on Investigation no. TA-201-52 under Section 201 of the Trade Act of 1974 (Washington, July 1984), p. 5.

tion is sought from the concerned parties and from publicly available sources. A report is prepared by the staff for the six Commissioners, who use its findings in their deliberations.

A public hearing is normally held within three months of the receipt of a petition, and all concerned parties, whether they are foreign or domestic, are permitted to participate. At the hearing both sides present their cases and call witnesses. Once the Commissioners have all the evidence they need, a final decision is made. This determination must be reached within six months of the receipt of a petition, and it is based on a number of legal tests, all of which must be "passed" for relief to be granted.

The first test is whether there are "one or more domestic producers who produce a like or directly competitive article in a major geographic area of the United States." The importance of this test is that the outcome of the subsequent tests might be determined by whether a broad or narrow definition of a domestic industry is adopted. In most cases this test is relatively straightforward, but in the case of an industry producing many differentiated products, the definition can be crucial.[3]

The second test concerns whether "there are increased imports (either actual or relative to domestic production) of an article in the United States."[4] In applying this test, the Commissioners examine import statistics for the most recent five-year period unless a longer span of time is considered more representative. Imports need not have increased during every year of this period, but there must have been a discernible upward trend in the figures (either actual or relative to production). This second test is almost always decided in the affirmative because a petitioner would not take on the expense of a case in the absence of this condition.[5]

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[3] Rodney de C. Grey, *United States Trade Policy Legislation: A Canadian View* (Montreal: Institute for Research on Public Policy, 1982), p. 24.

[4] U.S. International Trade Commission, "Unalloyed Unwrought Copper," Report to the President on Investigation no. TA-201-32 under Section 201 of the Trade Act of 1974 (Washington, August 1978), p. 13.

[5] Escape-clause cases will often cost the petitioner at least $500,000 in legal and research fees. Michael H. Stein, Nicole Sideris, and Alan W. Wolff, "Relief from Import Competition under the Escape Clause: Section 201 of the Trade Act of 1974," Book 5, *Law & Practice of United States Regulation of International Trade*, comp. and ed. Charles R. Johnston, Jr. (New York: Oceana Publications Inc., June 1987), p. 63.

The third test seeks to discover whether the domestic industry is "seriously injured, or threatened with serious injury." The factors that are considered relevant in judging this are set out in Section 201(b)(2), which calls on the Commission to examine "all economic factors which it considers relevant, including (but not limited to) ... the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry." The Commission also takes into account production, shipment, inventory, and price levels, as well as changes in market share. Given the number of factors that must be considered, the "serious injury" test can often be a matter of interpretation.[6]

The fourth and final test introduces the greatest degree of subjectivity into the process. The Commissioners must determine whether "increased imports of an article are a substantial cause of serious injury, or the threat thereof, to the domestic industry."[7] A substantial cause is defined in Section 201(b)(4) as "a cause which is important and not less than any other cause." In other words, imports must be no less significant than any of the other causes of injury, although they need not be more important than those others, either singly or in combination. To make such a determination, the Commission must examine the damage done both by imports and alternative causes of injury and assess the relative importance of each. The difficulty of doing this was recognized by the Senate Finance Committee in 1974 when it stated: [8]

> The Committee recognizes that weighing causes in a dynamic economy is not always possible. It is not intended that a mathematical test be applied by the Commission. The Commissioners will have to assure themselves that imports represent a substantial cause or threat of injury, and not just one of a multitude of equal causes or threat of injury.

In applying these rules, one of the key issues that has emerged is whether a recession can be considered a substantial cause of serious injury. A series of cases in the early 1980s turned on this question, but the Commission did not come up with a consistent answer. In the automobile case of 1980 the majority of Commissioners ruled that the recession was the substantial cause

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[6] ITC, "Unalloyed Unwrought Copper," pp. 13-14.

[7] Ibid., p. 13.

[8] Senate Finance Committee, quoted in ibid., pp. 31-32.

of the industry's problems, but in the 1983 heavyweight motorcycles case the opposite conclusion was reached.[9]

If all four of these tests are deemed by a majority of the Commissioners to have been met, the Commission must then make a recommendation to the President on what form of remedy to apply. The Commission can recommend the imposition of tariffs, quotas, tariff-rate quotas, or adjustment assistance; conversely, it can recommend that no relief be granted. Adjustment assistance, which is not really a form of "import relief," is rarely recommended because it generally does not provide enough help to an injured party. A company can receive only $1 million in loans and $3 million in loan guarantees through the adjustment assistance program.[10] If quotas are the recommended remedy, they must be global in scope and non-discriminatory in effect. This is achieved either by the establishment of country-by-country quotas or by auctioning off quotas to the highest bidder. This latter procedure was the only major change made to the escape-clause laws in 1979. Tariff-rate quotas are difficult to administer and therefore not often recommended, and tariffs are seen as less disruptive than quotas.

The Commission's recommendations are then submitted to the President who must make a final decision within 60 days. The choice of the appropriate remedy is left very much to the discretion of the President, who can either accept, reject, or modify the Commission's recommendation. The President is even free to devise a new remedy such as the negotiating of an orderly marketing agreement (OMA), of which a VER is but one example.

The President is required by Section 202 of the Trade Act of 1974 to take into account a variety of factors in deciding whether or not to grant relief. These factors include the extent of adjustment assistance being given to workers and firms in the industry, the effectiveness of relief in promoting adjustment, and the effect on consumers, competition, and the international economic interests of the United States. The President is also required to take into account the possible cost of compensation under Article 19 of the GATT, as well as the economic and social costs of not granting import relief.[11]

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[9] Stein, Sideris, and Wolff, "Relief from Import Competition under the Escape Clause," pp. 31-33.

[10] ITC, "Unalloyed Unwrought Copper," p. 24.

[11] Grey, *United States Trade Policy Legislation*, p. 45.

If the President decides on the basis of these factors to grant import relief, the decision is implemented by the Commerce Department. Any relief granted can remain in effect for a maximum of five years, although it can be renewed once for a maximum of three years. If, however, the President rules against import relief, Congress can overturn this ruling by passing a resolution calling for the imposition of relief. Such a resolution must be passed by both houses within 90 sitting days of the presidential decision, and it is subject to the normal procedures involving possible presidential veto and legislative override. In practice, congressional resolutions overturning presidential trade decisions are rare, although some have been successful.

The Countervailing Duty Laws

The main body of U.S. countervailing duty law is found in Sections 701 and 303 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979. The GATT Subsidies Code of 1979 has also been incorporated into U.S. law through an executive order of the President, and there is a long history of judicial precedent on this issue going back to the 1890s.[12] The U.S. countervailing duty laws are designed to protect U.S. industries from unfairly subsidized foreign exports, but originally these laws applied only to dutiable products. It was assumed at the time that foreign countries subsidized their exports only in order to neutralize the effects of U.S. tariffs, and so initially countervailing duties could not be applied to duty-free products. This practice was changed, however, by the Trade Act of 1974, which extended the coverage of the laws to non-dutiable products.

It is also important to note that since 1979 the United States has applied its countervailing duty laws differently for various categories of countries. The United States decided at that time that it would fulfil its obligations under the GATT Subsidies Code only in dealings with other signatories of the Code or to countries that had undertaken equivalent obligations. This has meant in practice that the new material-injury test agreed to at the Tokyo Round applies only to signatories of the Code or to members of the GATT whose products enter the United States duty-free. All other countries are covered

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[12] Edward R. Easton, "Countervailing Duty Investigations," Book 2, *Law & Practice of United States Regulation of International Trade*, comp. and ed. Charles R. Johnston, Jr. (New York: Oceana Publications Inc., June 1987). Unless otherwise noted, the source for this section is Easton's article.

by the U.S. laws that existed prior to 1979, which did not include a material-injury test.

Like the antidumping laws, the countervailing duty laws are administered jointly by the Commerce Department and the International Trade Commission. Upon the receipt of a petition, these two agencies begin investigations into the case, and countervailing duties are applied only if both agencies make an affirmative final ruling.

The first step in the process is that the Commerce Department must determine the sufficiency of a petition. A petitioner is required to supply information about the nature and effect of the alleged subsidization, and if it is unable to support the allegation with adequate information, the case will be dismissed. The determination of a petition's sufficiency must be made within 20 days of the filing of a case.

While the Commerce Department is doing this, the ITC conducts a preliminary injury investigation. The Commission is required to determine "on the best information available to it at the time" whether there is a "reasonable indication" of material injury by reason of imports. As with antidumping investigations, the level of proof necessary to demonstrate this is actually quite low, especially given the House Ways and Means Committee's instruction to the Commission in 1979 that a "reasonable indication" of material injury should be interpreted to mean that the domestic industry "could possibly be suffering material injury."

The ITC's preliminary injury investigation follows procedures that are also similar to an escape-clause investigation. That is, the staff collect information relevant to the case and a conference is held involving all the interested parties to the case. A report is submitted to the Commissioners presenting the facts of the case as the staffers see them, but unlike escape-clause cases, the Commission's General Counsel submits a memorandum analyzing the legal arguments of both sides. The Commissioners have 45 days from the filing of the petition in which to render a decision, which they do on the basis of a series of legal tests.

The legal tests applied by the Commissioners are also fairly similar to escape-clause cases. The first test is whether there is a domestic industry producing a product like that being imported. Once this test has been passed, a material injury test is applied. In countervailing duty cases, "material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant."[13] This means, in effect, that so long as there is a measurable degree

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[13] Grey, *United States Trade Policy Legislation*, p. 45.

of injury, an affirmative ruling will be made. To make this determination, the Commissioners examine a variety of factors. They determine whether imports have risen either absolutely or relative to domestic production or consumption, and whether imports have significantly undercut domestic prices or prevented price rises. Furthermore, the Commissioners are required to examine:

- actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity;
- factors affecting domestic prices;
- actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

If on the basis of these factors the Commissioners find material injury, they must then determine whether that injury was caused "by reason of" subsidized imports. The degree of causation that must be found is again very low, because the Commission has ruled that so long as imports are *a* cause of injury, the burden of proof shifts to the respondent to prove that imports were not *the* cause of the industry's problems. If all these tests are found to have been met, the ITC makes an affirmative preliminary ruling of injury.

The Commerce Department does not begin its own preliminary investigation into the existence of foreign subsidization unless and until the ITC has made an affirmative preliminary injury ruling; again, this is identical to the procedure for antidumping investigations. The Commerce investigation is conducted by the department staff, who contact the foreign government that is alleged to have subsidized the imports as well as the companies that are supposed to have benefited from the subsidy. If the foreign government is unwilling to supply the necessary information, Commerce uses the "best information otherwise available" to determine the existence or extent of a subsidy. In practice this means that it tends to use figures that work to the disadvantage of the foreign government.

If Commerce determines there has been a subsidy, it then attempts to calculate the net subsidy in *ad valorem* terms. The importance of this calculation is that an affirmative preliminary ruling means that the importer of the goods in question will have to post a security deposit equal in value to the net subsidy. Commerce must reach its preliminary ruling within 40 days of the ITC's preliminary ruling, unless the investigation is considered complicated, in which case a decision must be reached within 105 days.

The next stage in the countervailing duty process is the Commerce Department's final determination, which must be rendered within 75 days of the preliminary ruling. Similar procedures are followed as in the preliminary

investigation, except that a public hearing is held and the investigation is more detailed. If Commerce upholds its initial affirmative ruling, a notice is published in the *Federal Register* recording the net subsidy in *ad valorem* terms per imported unit. At this stage, a final ITC investigation begins. This must be completed in 45 days and, as with the Commerce Department's final investigation, public hearings are held. Should the ITC uphold its initial injury ruling, the process comes to an end and countervailing duties are imposed.

The International and U.S. Copper Markets

Our analysis of the U.S. trade cases involving copper requires that we essay at this stage a brief review of the contemporary structure of both the global and U.S. copper markets. Copper is a durable nonferrous metal that is noncorrosive and a very good conductor of electricity. It is used primarily in the electrical and construction industries, and is the leading nonferrous metal in terms of world mine production as well as consumption.[14]

Copper is found in 64 countries around the world, but its production is concentrated in only a few key countries. The United States has been the dominant producer in the world in the twentieth century, but its share of global production has steadily fallen as new sources of supply have been developed in the Third World.[15] Chile in particular has stepped up its output, so much so that by 1982 it had surpassed the United States as the world's leading producer.[16] However, by 1988 U.S. production had increased to the point that the United States and Chile were virtually tied for the

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[14] Gerhard Wagenhals, *The World Copper Market: Structure and Economic Model* (New York: Springer-Verlag, 1984) p. 1.

[15] The U.S. share of world copper production declined from 50.9 percent of world production in 1925 to 18.5 percent in 1976. Raymond F. Mikesell, *The World Copper Industry: Structure and Economic Analysis* (Baltimore: Johns Hopkins University Press, 1979), pp. 10-11. The expansion of production in the Third World took place during the late 1960s and early 1970s due to the optimistic assumption that the boom of the 1960s would continue and copper prices would remain high. These new mines came into production in the late 1970s and contributed to the over-supply problem of the early 1980s. "Annual Mineral Review and Forecast," *Canadian Mining Journal*, February 1986, p. 26.

[16] Thomas Loree, "Copper: Poised for a Slight Improvement?," *Northern Miner*, November 1986, pp. 20-21.

position of leading producer, each with about 16 percent of global output. The other major copper-producing countries in 1988 were the Soviet Union (estimated at between 6 and 12 percent of world production), Canada (8 percent), Zaire (6.1 percent), Poland (5.2 percent), and Zambia (5 percent).[17]

For much of this century, seven private-sector companies (Kennecott, Anaconda, Phelps Dodge, Union Minière, Anglo-American, Amax, and Inco) dominated world copper production. In the early 1950s, for example, these companies controlled 75 percent of the market economies' production.[18] The market power of these companies has declined greatly, however, and by the start of this decade they accounted for less than 25 percent of the nonsocialist world's production.[19] In part, this was attributable to the emergence of new companies in the traditional producing countries. More important was the nationalization in the 1960s and early 1970s of the copper mining industries in Chile, Zambia, Zaire, and Peru. Those nationalized companies that were not already vertically integrated soon extended their operations into all stages of production, and became major players in their own right. By the mid-1980s the nationalized companies accounted for 54 percent of world production, and one of them, Codelco, the Chilean national copper company, was responsible for a greater share of world production than the three largest U.S. companies combined.[20]

These state-owned companies created an important new problem for the industry, because they did not and do not always operate in a manner that maximizes profits. The reason for this is that Chile, Zambia, Zaire, and Peru (and, for that matter, Poland and the Soviet Union) are all highly dependent on the sale of copper as a source of export earnings; in 1987, copper exports accounted for 40 percent of the export earnings of Chile and 90 percent of Zambia's, while at the beginning of the decade the figures for Zaire and Peru

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[17] U.S. Bureau of Mines, *Mineral Commodity Summaries 1989* (Washington: Department of the Interior, 1989), p. 47.

[18] Janice L.W. Jolly, "Copper," in *Mineral Facts and Problems* (Washington: U.S. Bureau of Mines, 1985), p. 198.

[19] Ibid.; Wagenhals, *World Copper Market*, p. 9.

[20] José Luis Mardones, "The Copper and Aluminum Industries: A Review of Structural Changes," *Resources Policy* 11 (March 1985): p. 9.

were 65 and 22 percent respectively.[21] Consequently, these countries cannot afford to cut back production in times of oversupply, and as a result world copper production has outpaced consumption for much of this decade, until the last three years. Chile, for example, has increased its copper production continuously since 1970 despite an oversupply - save for 1979/80 - of copper in the mid-1970s and early 1980s.[22] One consequence of this overproduction by the nationalized companies was depressed world prices for copper from late 1981 until 1986, with the burden of adjustment being forced upon the private companies, which therefore experienced reductions in both volume and price for their production.[23]

A somewhat different picture emerges when one looks at copper consumption. The leading consuming countries in 1986 were the United States with 21.6 percent, Japan with 13.8 percent, the Soviet Union with 13.3 percent, and West Germany with 8 percent.[24] Within these countries, copper is used as an end product in the electrical, construction, industrial machinery, and transportation industries, which respectively accounted for 65, 18, 6, and 5 percent of world output.[25]

Copper consumption rose steadily in the 1950s and 1960s, but since then it has almost stagnated. After more than doubling from 3.1 million tons in 1953 to 8.7 million tons in 1973, consumption increased only to 10.8 million

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[21] "Copper Producers Riding High," *Mining Journal*, 20 November 1987, p. 417; Louis J. Sousa, *The U.S. Copper Industry: Problems, Issues and Outlook*, (Washington: U.S. Department of the Interior, Bureau of Mines, 1981), p. 13.

[22] Chile's copper production rose from 685,000 tons in 1970 to 1.4 million tons in 1985. Loree, "Copper," p. 21.

[23] Between 1979 and 1982 the price of copper fell by 30 percent in real terms and, as a result, the U.S. mining companies cut back their production by 20 percent. The response of the nationalized companies was quite different. Zambia cut back output by only 4 percent and Chile and Zaire increased their production in this period by 17 and 26 percent respectively. Aleksander Markowski and Marian Radetzki, "State Ownership and the Price Sensitivity of Supply: The Case of the Copper Mining Industry," *Resources Policy* 13 (March 1987): p. 19.

[24] American Bureau of Metal Statistics, *Non-Ferrous Metal Data 1986*, pp. 12-13.

[25] These are 1985 U.S. figures, but roughly similar consumption patterns exist in most other developed countries. U.S. Bureau of Mines, *Minerals Yearbook 1985*; vol. 1: *Metals and Minerals* (Washington: Department of the Interior, 1986), p. 332.

tons by 1986. The explanation for this is twofold. First, copper consumption is tied very closely to the health of the economy; hence, the sluggish economic growth rates of the 1970s and early 1980s slowed the annual consumption of copper. Secondly, use of copper in industry, has been declining, due to substitution of such other products as aluminum and fibre optics, and to declining intensity of copper use in such products as automobiles and electronic equipment.[26] One can, however, overstate the degree to which substitution is forcing copper out of some of its traditional uses, such as in automobiles.

The most distinctive characteristic of recent world copper prices is the degree of fluctuation. Copper prices have been the most volatile of the metal prices; and, among internationally traded commodities, only sugar prices have fluctuated more widely.[27] One reason for these dynamic price movements is that copper supply is relatively fixed (new mines take at least five years to come on stream), while demand is quite variable. Thus, in boom times, copper supply does not rise as fast as demand, and as a result copper prices rise rapidly. In times of recession, on the other hand, demand drops sharply without a corresponding decrease in supply, and hence copper prices plummet. Copper prices were quite high in 1974 and during the period from 1979 to late 1981, and have been rising again since 1986; however, they were quite low in the periods between these years.

This, of course, is not the sole explanation, for other minerals are subject to these same structural forces. Perhaps a more relevant characteristic of world copper prices is that there has been a gradual movement away from stable producer-dictated prices to more variable free-market ones. The copper oligopolies often used to collaborate in setting prices, which they could do because of their market power in the industry.[28] As the dominance of

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[26] Carmine Nappi, "Has the Bell Tolled for the North American Mineral and Metal Industry?," *Resources Policy* 11 (December 1985): 231-32.

[27] A.J. Hughes Hallett, "Would Commodity Market Stabilization Agreements Redistribute Economic Resources to Developing Countries? The Case of Copper," *Resources Policy* 13 (June 1987): 104.

[28] Herfindahl's study of the 75-year period from 1883 to 1957 showed that there were at least 22 years in which the major copper companies colluded to stabilize copper prices. Orris C. Herfindahl, *Copper Costs and Prices: 1870 to 1957* (Baltimore: Johns Hopkins University Press for Resources for the Future, 1959), p. 154. For a thorough analysis of the phenomenon of "producers' prices," see Theodore H. Moran, *Multinational Corporations and the Politics of Dependence: Copper in Chile* (Princeton: Princeton University Press, 1974), pp. 49-54.

these companies declined, so did their ability to set prices. This process was slower in the U.S. domestic market, as a result of both its relative isolation from world trends and the continued dominance of the major U.S. copper companies. However, in May 1978 the U.S. companies abandoned their practice of setting a domestic price that was different from the world price.

A noteworthy development in the copper industry has been a dramatic increase in production costs during the 1970s. In the 1960s the cost of producing a ton of copper rose from $1700 to $2800; by 1980, costs had risen to more than $4000 a ton.[29] Vigorous but capital-intensive cost-cutting measures were introduced in the early 1980s in an effort to reverse this trend, but the short-term effect of these (eventually successful) efforts was a large increase in debt loads in the industry.[30] To be sure, production costs have not been standard across the global industry; indeed, they can and do vary considerably from one country to the next. Chile, for instance, is the lowest-cost producer, due to the richness of its ore as well as to its low wages; in 1982 its breakeven price was 50 cents a pound. The United States, by contrast, was the world's highest-cost producer of copper, needing a price of 90 cents a pound to cover costs in 1982. The main reason for high U.S. production costs at the time was an average ore grade roughly 30 percent lower than that of the other main producing countries. U.S. companies thus required more labour and energy to produce the same amount of copper as their competitors.[31] This is no longer the case, however.

U.S. copper-mine production is centred in Arizona and a few other south-western states, with the later stages of processing performed chiefly on the east coast. On the eve of the 1978 escape-clause case (to which we shall presently turn), Arizona accounted for 61 percent of U.S. copper-mine production, the other producing states being Utah (13 percent), New Mexico (11 percent), Montana (6 percent), Nevada (4 percent), and Michigan (3 percent). Concentrating and smelting are all performed near the mine site,

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[29] Kenneth Warren, "Copper," in *Mineral Resources* (Baltimore, Penguin Books, 1973), p. 143; Walter C. Labys, *Market Structure, Bargaining Power, and Resource Price Formation* (Lexington, Mass.: Lexington Books, 1980), p. 79.

[30] Kenji Takeuchi, John E. Strongman, and Shunichi Maeda, "The World Copper Industry: Its Changing Structure and Future Prospects," World Bank Staff Commodity Working Paper no. 15 (Washington: World Bank, 1986), p. 59.

[31] U.S. Library of Congress, Congressional Research Service, *The Competitiveness of American Metal Mining and Processing* (Washington: U.S. Government Printing Office, 1986), p. 22.

but the refining and fabricating stages are often undertaken elsewhere. For example, 60 percent of the refining is done in either Texas or the mid-Atlantic states and the fabrication plants are found almost entirely on the east coast.[32] Significantly, 70 percent of U.S. production of refined copper occurs in the wire and cable mills of New York, New Jersey, and Connecticut, and 28 percent in the bronze mills of Connecticut, Illinois, and Pennsylvania; this geographic distribution affected the political willingness of Presidents Carter and Reagan to grant import relief to the mining section, as we shall relate below.[33]

One of the problems faced by the U.S. copper industry until recently has been relatively low or even negative productivity growth. Continuous declines in productivity characterized the 1960s and 1970s, while during the early to mid-1980s productivity may have stopped falling, but it did not increase.[34] Part of the explanation for this stems from there having been no new smelters or refineries built during this period, which is symptomatic of the industry's more general problem of chronic underinvestment.

The problem of rising production costs that we noted for the global copper industry has been felt acutely by the U.S. producers. In the period from 1965 to 1975, unit mining costs in the United States doubled; in the 1975 to 1983 period they increased by a further 85 percent.[35] The reasons for this we gave earlier, but there is one additional cost factor that was, if not unique to the United States, at least more noticeable there than elsewhere: in the 1970s, Washington enacted a series of environmental-protection regulations that forced the copper industry to use cleaner production techniques. The cost of complying with these regulations was high, and as a result the competitive position of the U.S. industry was further undermined. By 1978, their increasingly tenuous competitive position led the major U.S. producers to seek import relief under the provisions of Section 201. It was to be the first of two such endeavours within less than a decade.

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[32] ITC, "Unalloyed Unwrought Copper," p. 2.

[33] ITC, "Unwrought Copper," p. A15.

[34] Congressional Research Service, *Competitiveness of American Metal Mining*, p. 25.

[35] Markowski and Radetzki, "State Ownership," pp. 33-34.

The 1978 Escape-Clause Case

On 17 March 1978, 12 U.S. copper companies launched an escape-clause case alleging that foreign imports had caused serious injury to their industry. In response to this petition the ITC published notice that a public hearing would be held in late May 1978, and an investigation was begun.[36]

The public hearing and the ITC investigation revealed that the U.S. copper industry was indeed facing a number of serious problems, one of the most serious of which was the deterioration of the trade balance in refined copper. Imports had risen substantially, while exports were falling. In the period from 1969 to 1978, with the sole exception of 1975, refined copper imports rose in every year, increasing from 131,000 tons in 1969 to 457,000 tons in 1978.[37] Import penetration also grew apace, from 8.8 percent of domestic consumption in 1973 to 20.7 percent in 1977. During the first five months of 1978, refined copper imports were entering the United States at an annualized rate of 652,000 tons.[38] The decline of U.S. copper exports was also worrisome. These had reached a peak in 1970, but fell continuously thereafter. In that peak year, the United States exported 291,000 tons of refined copper; by 1977, exports had decreased to 76,000 tons.[39]

The investigation also revealed that the U.S. copper industry had suffered declining production and employment. Mine production, which had been some 1.7 million tons in 1973, was 1.5 million tons in 1977. Similarly, employment in the industry had shrunk from 52,610 in 1973 to 41,882 in 1977, with the number of worker hours down from 92.5 million in 1973 to 73.7 million

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[36] The companies involved in the 1978 case were Anaconda, ASARCO, Cities Service Co. (Minerals Group), Copper Range, Cyprus Mines, Duval, Hecla Mining, Inspiration Consolidated Copper, Kennecott Copper, Magma Copper, Phelps Dodge, and Ranchers Exploration and Development. ITC, "Unwrought Copper," pp. 1-2.

[37] Sousa, *U.S. Copper Industry*, p. 22.

[38] ITC, "Unalloyed Unwrought Copper," p. 5.

[39] The decline in U.S. copper exports is owing chiefly to the fact that as the nationalized companies integrated their operations more fully, they no longer turned to the United States to refine their blister copper. Thus, the decline in exports was due mainly to a reduction in copper re-exports. Sousa, *U.S. Copper Industry*, p. 22.

in 1977. In June 1978, no fewer than 13,883 copper workers were receiving adjustment assistance.[40]

Nor was that all. The Commissioners encountered a U.S. copper industry experiencing low and declining profitability, with average return on equity well below that of the manufacturing sector; there was also a definite downward trend in profits.[41] In addition, capacity utilization in the industry slipped from 79.7 percent in 1973 to 65.5 percent in 1977. Not surprisingly, in this context U.S. copper producers amassed sizable inventories of unsold copper, inventories that by 1977 were more than four times larger than they had been in 1973. Finally, the cost of complying with domestic pollution-control regulations was becoming a major burden on the industry, consuming 41 percent of the $1.7 billion spent by the industry on all its capital expenditures between 1973 and 1977.[42]

The ITC staff report was submitted in June to the Commissioners, who announced their final decision on 23 August, ruling by a four-to-one vote that imports had been the cause of serious injury to the domestic copper industry, and recommending to President Carter that a five-year quota of 300,000 tons be applied retroactive to the beginning of the year. To understand how the Commissioners arrived at this prescription, let us examine their answers to the four legal tests required of Section 201 procedures.

The existence of a domestic industry producing a like or directly comparable product was hardly in doubt in this case, and the question of increased imports was similarly non-controversial, since imports had clearly risen, both absolutely and relative to domestic production. The Commissioners also ruled (unanimously) that there had been serious injury to the domestic producers, and in so ruling they cited declines in production, employment, capacity utilization, and profits, as well as the dramatic rise in inventories.

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[40] ITC, "Unalloyed Unwrought Copper," pp. 3, A19, A28-29.

[41] The average return on equity for the U.S. copper producers was 9.8 percent as compared with 13.4 percent for all of the manufacturing sector. T.T. Tomimatsu, *The U.S. Copper Mining Industry: A Perspective in Financial Health* (Washington: United States Department of the Interior, Bureau of Mines, 1980), p. 11. Evidence of declining profits can be seen in the fact that the U.S. producers' net profit before tax was $658 million in 1973, $632 million in 1974, a loss of $70 million in 1975, a profit of $78 million in 1976, and a loss of $123 million in 1977. ITC, "Unalloyed Unwrought Copper," p. A34.

[42] Sousa, *U.S. Copper Industry*, p. 36.

The only question on which there was some dispute in 1978 was whether imports were a substantial cause of the serious injury suffered by the industry. Commissioners Parker, Alberger, Bedell, and Minchew all ruled in the affirmative on this question. In surveying alternative explanations for the industry's problems, they could find no other factor as significant as imports. They took into consideration seven alternative explanations:

- copper consumption had fallen;
- there had been substitution away from copper to aluminum;
- pollution-control costs had hurt the industry;
- wage costs had risen rapidly;
- the strike of 1977 had contributed to the decline in production;
- inferior ore grades had increased costs;
- the vertical integration of foreign copper companies meant that less refining was done in the United States.

The four Commissioners reasoned that increased imports provided the best explanation for the industry's problems; after all, imports had risen faster than domestic production, thereby taking away market share from the U.S. companies, and they had transmitted depressed world prices into the U.S. market, thereby preventing U.S. companies from operating profitably.

Commissioner Ablondi was the only member to rule that imports were not a substantial cause of serious injury. To him, the domestic industry had been seriously injured only in the years 1975 and 1977, and in both these years alternative and more persuasive explanations for injury could be adduced. In 1975 refined copper imports were at a five-year low of 142,000 tons; consequently, Ablondi said, they could not have been the cause of injury at that time. Similarly, in 1977 imports were only 6,000 tons greater than in the previous year; thus they could not have been the cause of injury then, either. Ablondi attributed the injury of 1977 mainly to the strike, to depressed world prices, and to the fact that less foreign copper was being refined in the United States.

On the matter of what remedy to recommend, there was agreement both that adjustment assistance would be an inadequate solution to the industry's problems and that, given the wide price fluctuations in the industry, tariffs might also be ineffective. The Commissioners rejected the petitioners' request that a quota of 198,000 tons of refined copper should be established; they felt that this was too low, and a level of 300,000 tons was chosen. This quota was made retroactive to 1 January 1978, thereby allowing inventories to be drawn down. It was further stipulated that no more than 25 percent of the quota could enter the country in any given year during the period of import relief.

These two recommendations would effectively have barred imports for the remainder of the year.[43]

On 20 October 1978 President Jimmy Carter announced he was rejecting the ITC's recommendations, claiming they were not in the national interest of the United States, for several reasons. To begin with, import barriers would impose significant costs on domestic copper consumers. In any event, relief could easily be circumvented by importing more copper at earlier stages of production; thus, granting relief would merely nullify the benefit to producers while increasing the costs to consumers. Besides, said Carter, the economic situation of the industry appeared to be improving. World copper prices were on the rise, and so was domestic production. By contrast, both inventories and imports were declining.

The President was concerned that other countries might retaliate if he granted relief. There is no evidence that Carter was responding to any specific threat of retaliation, but he was clearly sensitive to the possibility of such a threat. Nor could he see how granting relief could positively affect the international economic interests of the United States; the reverse was more likely. The Tokyo Round negotiations were then coming to a conclusion, and the President did not want to upset the other copper-producing countries at such a crucial juncture. Related to this was his fear about possible damage to the negotiations on an Integrated Program for Commodities (IPC), as well as to bilateral relations with Canada and various less-developed nations. Finally, Carter argued that granting relief was in any case redundant, because adjustment assistance would continue to be available to displaced workers in the copper industry.[44]

The 1984 Escape-Clause Case

Dismayed, though apparently undeterred, by their failure to obtain relief in 1978, the U.S. copper companies tried again in 1984. On 26 January 1984, 11 companies petitioned for relief under the escape-clause laws and an investiga-

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[43] ITC, "Unalloyed Unwrought Copper," pp. 18-34.

[44] The material for this section on President Carter's decision to reject import relief in 1978 is from Presidential Memorandum 3195-01-M of 20 October 1978, found in ITC, "Unwrought Copper," pp. A96-97.

tion was instituted.[45] The petitioners, who had formed themselves into the Coalition of Copper Industry Companies, were seeking a five-year import quota on unwrought copper of between 294,000 and 353,000 tons annually, with the bulk of the reduction focused on Chile. The Coalition recommended that Chile be given an annual quota of 100,000 tons, with the rest of the quota being put into a basket category for all of the other countries.[46] The petition blamed imports for the U.S. copper industry's problems, and warned that the industry's condition was critical.

The filing of the case was, in fact, only one element of a campaign for protection planned by the copper producers. The Coalition of Copper Industry Companies was also ready to launch two other elements in the campaign, both designed to bolster its chances of winning import relief. The Coalition intended to use a media campaign involving newspapers, magazines, and television to reinforce its message that the copper industry was in a desperate state because of overproduction by state-owned copper companies in the Third World.[47] The final element in the campaign was the generation of a number of bills in Congress requesting protection for the industry. Three of these called for higher copper tariffs, and one for quotas.[48] None of these bills ever stood much chance of passing, but their purpose was to put political pressure on the White House to grant protection.

The International Trade Commission held hearings on the copper case in mid-May 1984, at which the interested parties presented their views. Three

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[45] The petitioners in the 1984 escape-clause case were Anaconda, ASARCO, Copper Range, Cyprus Mines, Duval, Inspiration, Kennecott, Magma, Phelps Dodge, Pinto Valley Copper, and Ranchers Exploration and Development. Ibid., pp. 2-3. Unless otherwise noted, material in this section is based on this report.

[46] Eduardo Lachica, "Copper Imports Hurt U.S. Firms, ITC Decides," *Wall Street Journal*, 15 June 1984, p. 4.

[47] William Serrin, "Helping Phelps Dodge Fight Big Odds at Home and Abroad," *New York Times*, 23 September 1984, p. F6.

[48] S. 2340 was put forward by Senator De Concini of Arizona and H.R. 2413 was written by Congressman Udall of Arizona. Both of these bills would have increased copper tariffs in order to offset the industry's expenditures on environmental protection devices. H.R. 2594 was initiated by Congressman Davis of Michigan, who called for higher tariffs to aid the recovery of the copper industry. Senator De Concini also put forward S. 2696, which called for a copper quota of 300,000 tons per year. ITC, "Unwrought Copper," pp. A8-A9.

main groups made presentations: domestic copper fabricators, foreign copper producers, and domestic copper producers. All of these groups had different interests and arguments, so it is necessary to examine each separately.

The domestic copper fabricators were a diverse group of companies united by the fact that they all used copper as an input in their products. They formed themselves into the Copper and Brass Fabricators Council, which was led by Henry Schweich of Cerro Copper Products and dominated by the National Electrical Manufacturers Association. The Fabricators Council was concerned that import relief would cause copper prices to rise, thereby increasing their costs and making them less competitive. They argued that relief would merely transfer unemployment from the mining areas of the southwest to the copper users on the east coast, and that higher prices would speed the process of substitution away from copper. They also worried that, if relief were granted, the foreign copper producers would switch their exports to higher-value fabricated products, which would greatly increase the amount of foreign competition facing them. The Fabricators Council pointed out that they represented 150,000 workers, compared to only 20,000 production workers in the copper industry, and concluded that their concerns should therefore be given priority in any assessment of the national interest.[49]

The foreign copper producers were also active, although they preferred to take a background role and let the domestic fabricators carry the burden of opposing protection. Chile, the country most directly threatened by this case, was also the most active of the foreign producers. The Chileans argued that their advantage in the U.S. market was due to the fact that they had the highest ore grades in the world, not to any unfair trading on their part. Import restrictions, they stressed, would merely make it more difficult for them and other heavily indebted countries to meet their debt-servicing obligations.

Zaire, Peru, and Mexico all made similar arguments, and Zambia added that strikes were another important factor behind the U.S. industry's problems. It pointed out that, in the non-strike years of 1979, 1981, and 1982, imports had averaged only 291,000 tons, a level lower than the quota sought by the petitioners.[50] The Canadian copper companies also became involved

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[49] Clyde H. Farnsworth, "Protectionist Pressures Are Building: President Faces a Tough Call on Whether to Help Steel and Copper Industries," *New York Times*, 24 June 1984, p. D3.

[50] Allanna Sullivan, "Agency Decision on Copper-Import Curbs Could Recast Shape of a Sagging Industry," *Wall Street Journal*, 11 June 1984, p. 36.

because they feared being negatively affected even though the case was not aimed at them. They argued that they had cut back production in the face of global excess supply and were fair traders, and warned that they would fight any effort to restrict their exports to the United States.

For their part, the petitioning copper producers blamed surging imports at depressed world prices as the cause of their problems, and they cited increased unemployment, low capacity utilization, record losses, and plant closures as examples of the damage that had been done. In addition, the copper industry had a further grievance. It complained that many of its Third World competitors had been receiving assistance from the multilateral development banks, thereby putting the U.S. producers at a disadvantage. Many LDCs had received low-interest loans from the World Bank and Inter-American Development Bank to expand their productive capacities. This angered the U.S. producers, who saw these loans as subsidies that worsened the problem of global excess supply. Similarly, in 1982 and 1983 the International Monetary Fund paid out a total of $1.7 billion through its Compensatory Financing Facility to Chile, Zambia, Zaire, and Peru for shortfalls in export earnings arising from low world copper prices.[51] This was an even greater source of frustration for the U.S. industry, because it rewarded the very countries that had created the problem in the first place. To make matters worse, the U.S. government was the largest contributor to all of these multilateral development banks, which meant that U.S. money was being used to damage the United States copper industry!

The International Trade Commission announced its injury ruling on 14 June 1984 and, as expected, it found that the copper industry had suffered serious injury. The more important question, however, was that of causation and remedy, which the Commissioners did not decide until 27 June. The unanimous decision of the Commissioners in this case was that imports had been the cause of the serious injury suffered by the domestic copper producers. The Commissioners were, however, unable to agree on what type of remedy to apply; two called for tariffs, two for quotas, and one recommended that no relief be granted. Let us review how they reached these decisions.

The existence of increased imports was not as straightforward in 1984 as it had been in 1978. The problem was that between 1979 and 1983 there had been large fluctuations in import levels, in both absolute and relative terms. Imports did rise sharply in 1980 and 1983, but they fell in each of the other

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[51] George B. Munroe, "The U.S.-Funded Foreign Assault on the U.S. Copper Industry," *New York Times*, 27 August 1984, p. A18.

three years examined; the same trend applied in terms of imports relative to consumption. While imports increased by 8.5 percent annually from 1973 to 1983, and imports relative to consumption jumped from 9.5 percent in 1979 to 25.8 percent in 1983, both of these sets of figures were skewed by unusually low starting points and unusually high end points. Notwithstanding these flawed data, the Commissioners arrived at an affirmative ruling in the matter of import penetration.

The question of serious injury was not really in doubt in the 1984 case. In the period 1979 to 1983, mine output fell by 27.6 percent, smelter production by 29.3 percent, and refinery production by 21.3 percent. Over the same years, capacity utilization fell sharply: mine capacity utilization dropped from 78.5 to 59.8 percent, smelter from 77.7 to 56.8 percent, and refinery from 86.8 to 62 percent. Furthermore, employment in the industry by 1983 was nearly 40 percent lower than in 1979, and wages were down by 21.6 percent. Finally, both sales and profits had suffered. With a sales slump of almost 24 percent, the industry witnessed its profit of $820 million in 1979 turn into a loss of $523 million by 1982, followed by another loss of $211 million in 1983.

The Commissioners ruled unanimously that imports were a substantial cause of serious injury to the U.S. producers, but two very different lines of argument were used. Commissioners Alfred Eckes, Seeley Lodwick, David Rohr, and Susan Liebeler held that imports were a more important cause of serious injury than any alternate explanation. To be sure, they did concede that declining domestic consumption, and strikes in 1980 and 1983, had both contributed to the industry's problems, but neither factor was considered as important as imports. The four Commissioners also examined the recession of the early 1980s as a causal factor, but rejected it on the grounds that

> We do not believe that Congress intended that a cyclical downturn *per se* be a cause of injury. If this were the case, the Commission ... would be compelled to make a negative finding whenever our finding was made during a cyclical downturn. Rather, we believe that Congress intended that we examine the impact of imports in the course of the business cycle.

Similarly, they rejected the idea that low world copper prices had caused the industry's problems, maintaining instead that imports were the vector for transmitting low world prices to the domestic industry. Finally, the four considered the problem of low U.S. ore grades, which while obviously inferior to those of Chile and other producers, had to be seen as a long-term structural problem; for this reason, they were rejected as the immediate cause of

injury. Thus, having discounted the other possible causes of the industry's problems, these members of the Commission had no choice but to rule that imports were the most significant source of injury.

Chairwoman Paula Stern took a very different tack, suggesting that the injury had emerged only when world prices began to fall in 1981, and rejecting the idea that imports had been the cause of the injury since that time. She sought to demonstrate this by stressing the "curious absence of a correlation between changes in the level of imports and changes in U.S. copper prices over the past several years." To her, it was clear that the increase in import levels in 1980 and 1983 could only be explained by the strikes of those years. Curiously, having shown why relief was not justified, Stern went on to grant it anyway. She ruled that imports posed a threat of serious injury to the domestic producers, because low world prices could in future lead to the domestic market becoming flooded by low-priced imports. (It will be recalled that Section 201 allows for import relief not only in the event of "serious injury," but also if such injury loomed as a "threat.")

The Commissioners could not agree on what remedy to recommend. Stern and Rohr called for a duty of five cents per pound because this was the amount by which imports were estimated to have depressed U.S. copper prices. Eckes and Lodwick, by contrast, wanted a five-year quota of 375,000 short tons of unwrought copper and 50,000 short tons of black, blister, and anode copper. For her part, Liebeler argued that no remedy should be applied, since "the future condition of the copper industry is not dependent on import relief, but rather on the future cost and revenue prospects of this industry."

The Campaign for Protection: The Decision-Making Stage

Once the International Trade Commission had rendered its final ruling, decision-making authority shifted to the administration. The copper case was referred to the President's sub-Cabinet Trade Policy Review Group, which was charged with the task of reviewing possible trade policy options and recommending a course of action.[52] There were four basic options for the sub-Cabinet Group to consider: increased tariffs, restrictive quotas, negotiated

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[52] Clyde H. Farnsworth, "Split Cited on Copper Import Bar," *New York Times*, 30 August 1984, p. D1.

production limitation agreements with foreign producers, or no relief. Each of these options had its strengths and weaknesses, but the no-relief option was the one that quickly gained considerable support. Why was this so?

The problem with imposing either tariffs or quotas was that neither offered effective protection for the copper producers, and both would have angered the domestic copper users and the foreign copper producers. The reason that these forms of relief were ineffective was that they would both have added at most eight to ten cents a pound to the price of copper.[53] Thus, given that the world price of copper was between 60 and 70 cents a pound and U.S. production costs required a price of between 80 and 90 cents to break even, neither tariffs nor quotas could have provided adequate relief for the industry. The copper producers admitted as much in the case of tariffs, but they continued to argue that quotas would be an effective remedy.[54]

Seeking negotiated production-limitation agreements with the foreign producers was also considered, because it would have solved most of the administration's trade policy concerns. The copper producers, who had wanted this option all along, had suggested it when it became obvious that they would not derive much benefit from either tariffs or quotas.[55] The advantages of production-limitation agreements were that they would not have hurt the domestic fabricators, and they would have provided a solution to the domestic producers' greatest concern, the global oversupply of copper which was depressing prices. The domestic fabricators were initially receptive to this idea, but in the end they decided that it was better simply to oppose all forms of relief. The greatest problem with this option, of course, was the foreign producers, who were simply unwilling to enter into any restraint agreements. There is no evidence that the exporting countries threatened to retaliate if relief was granted, but the fear of retaliation was obviously a factor in this case. Admittedly, the copper producers were also quite active in their own lobbying, but in contrast to their opponents, their efforts lacked both intensity and effectiveness.

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[53] Clyde H. Farnsworth, "Reagan Denies Import Protection to Domestic Producers of Copper," *New York Times*, 7 September 1984, p. A1.

[54] Richard O. Cunningham, Spokesman for the Coalition of Copper Industry Companies, in Eduardo Lachica, "ITC is Divided on How to Aid Copper Industry," *Wall Street Journal*, 28 June 1984, p. 16.

[55] Destler and Odell, *Anti-Protection*, p. 17.

Another pressure facing President Reagan at the time was the need to render a decision in the midst of a presidential election campaign. This timing was no accident; quite the contrary, for the domestic copper producers filed their case in January knowing that Reagan would be extremely vulnerable to political vicissitudes in the fall of 1984, when the regulatory timetable would have required a decision. The producers assumed that the President would not dare appear insensitive to the interests of a hard-hit domestic industry in the midst of a campaign. There were, however, some other political considerations to be taken into account - considerations to which the domestic producers were surprisingly inattentive.

The first was that the White House also had to rule on an escape-clause case involving steel at the same time. Reagan's clearly stated (and reiterated) preference for free trade meant that it was unlikely he would consent to import relief in each case; on the other hand, political considerations would likely preclude his rejecting it for both. Faced with a choice between the large and politically powerful steel industry, concentrated in the midwest, rich in electoral votes, and the much smaller and less well-organized copper industry, the President had *prima facie* political grounds to withhold relief from the less relevant states.

A second political factor that came into play was the location of both copper producers and users (i.e. fabricators). The former were concentrated mainly in Arizona and Utah, where Reagan's political base was solid; the latter, however, were found mainly along the east coast, where his electoral support was much weaker. The President's political advisors were not inattentive to this geographical reality.

Finally, Reagan was probably influenced by the form that effective relief for copper might have had to take. He knew that tariffs and quotas alone would not do much to improve the position of the domestic copper producers; however, the most effective potential alternative, global production-limitation agreements, he held to be ideologically repugnant. The U.S. copper producers, as we have noted, had hoped for global production limitations from the beginning, and had lobbied quite strenuously for them. Not surprisingly, Chile and other copper-producing countries were unreceptive to this idea; and when the copper fabricators withdrew their initial support for the scheme, the administration announced that it would never support an "OPEC for copper."[56]

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[56] Ibid., pp. 17-18.

In view of these political considerations, it was to be expected that President Reagan would refuse to grant relief to the domestic copper producers. In doing so, he argued that it was not in the international economic interests of the United States to grant protection, and he referred specifically to the damage that would be done to the users of copper if relief were granted. Reagan indicated that adjustment assistance would continue to be made available to the copper industry, but he spurned more substantial relief.[57]

What can one conclude about the two escape-clause cases and the issue of the new protectionism? Given that neither case led to the application of quotas or duties, it might at first appear that the concern - even qualified as it was - that we expressed in chapter 1 over the rise of the new protectionism is misplaced. We do not draw such an inference, however, for two reasons. First, both cases illustrate the critical importance of presidential discretion in maintaining a more open trading system. In each case, import protection would have been imposed had the recommendations of the ITC been mandatory, and it was only the decision of the White House that prevented the industry from obtaining relief. Therefore, these cases suggest that any thrust toward the limitation of presidential discretion - such as that represented by the 1988 trade legislation - could, if allowed to gather momentum under a different administration, lead to a substantial increase in protection.[58]

Secondly, we argue that the 1984 case in particular illustrates a pervasive if subtle protectionist bias, both in the U.S. escape-clause laws and among the ITC Commissioners who must administer them. The Commissioners held that there *were* increased imports, despite considerable evidence to the contrary, and then proceeded to rule that these imports were a substantial cause of serious injury without ever establishing a logically valid correlation between these factors. That they peremptorily discounted low world prices, the recession of the early 1980s, and declining U.S. ore grades as likely causes of the industry's injury speaks volumes about their biases.

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[57] Presidential Memorandum for the U.S. Trade Representative concerning Copper Import Relief Determination, 10 September 1984.

[58] The 1988 trade legislation will have the effect of making the United States more vigorous in pursuit of its export interests, and more likely to retaliate in cases of "unfair" trade. See Clyde H. Farnsworth, "U.S. Push on Exports Sets Up a New Battle of the Barriers," *New York Times*, 7 August 1988, p. 4:1. One of the few trade measures that continues, in the wake of the 1988 legislation, to permit a good deal of presidential discretion, is Section 232 of the Trade Expansion Act of 1962 (which we discuss in the next chapter). Interview, Washington, 14 June 1989.

An Emerging Threat? The Issue of Countervailing Duties

The failure of the U.S. copper companies to obtain relief in 1978 and 1984 left them frustrated and disillusioned. They felt (in the circumstances, not incorrectly) that the main reason they had not won these cases was that Presidents Carter and Reagan had been swayed by extraneous political considerations, and they concluded from this that they would never again use the aleatory escape-clause route to seek protection. Nevertheless, the companies remained interested in obtaining import relief because their financial prospects were not improving in 1985 and 1986.[59] At first they sought relief through a number of protectionist bills put forward by the Congressional Copper Caucus, but when none of these achieved much success the producers began searching for a new trade remedy that might not be so easily frustrated by political considerations.[60] To this end, they began to explore a possible resort to the U.S. countervailing duty laws. This exploration, to date, has not been a particularly vigorous one, for the return of high prices in 1987 and 1988 has greatly reduced the U.S. producers' appetite for import restrictions. Nevertheless, the short-lived, post-1984 contemplation of other avenues to import relief is worth discussion, for in the event that the domestic industry experiences a downturn in the 1990s, it can only be expected that imports will once more become an object of concern.

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[59] The problems of the industry included record import penetration in 1985 (28 percent), continuing high unemployment, and further mine and smelter closures. In addition, the soaring value of the U.S. dollar combined with currency devaluations in the copper-producing countries made the producers' competitive problems even worse. U.S. Bureau of Mines, *Minerals Yearbook 1985*, pp. 320, 335-36.

[60] A number of bills were introduced in Congress to aid the U.S. copper producers following Reagan's rejection of escape-clause relief. The purpose of five of these bills (H.R. 1520, 1562, 2557, and 3714, as well as S. 627) was to mandate the negotiation of international production-limitation agreements. There were also four bills (H.R. 126, 936, and 2557, as well as S. 114) that dealt with U.S. contributions to multilateral development banks that lent to the copper-producing countries. In addition, S. 351 would have imposed a five-year quota on certain copper articles and S. 353 would have increased import duties on copper by an amount offsetting the cost of installing pollution-control devices. The Trade and Tariff Act of 1984 also contained a non-binding "sense of Congress" resolution calling for voluntary import restraints but, as in all of the above examples, nothing came of it. U.S. Bureau of Mines, *Minerals Yearbook 1984*, pp. 292-93 and U.S. Bureau of Mines, *Minerals Yearbook 1985*, pp. 318-19.

The U.S. copper companies maintain that their foreign competitors receive domestic subsidies in a variety of ways, one of which is for the installation of pollution-control devices on smelters. The U.S. industry points to the enormous costs it is forced to shoulder to bring itself into compliance with federal environmental regulations, and it argues that foreign subsidies give its rivals an unfair competitive advantage. How valid is this claim? To answer this requires that we pay some attention to three issues:

- those U.S. environmental laws of relevance to the copper industry;
- the effects of these laws on the domestic producers;
- the allegations regarding foreign subsidization.

The most important environmental law relevant to the copper industry is the Clean Air Act of 1970.[61] This act established maximum emission levels of sulphur dioxide and particulates from point sources and required that 90 to 98 percent of these emissions be contained. To comply with these National Ambient Air Quality Standards (NAAQS), the copper companies initially used two main techniques. Tall smokestacks were built to disperse the emissions, and copper smelters were operated only intermittently when weather conditions permitted favourable dispersions. The problem with these techniques was, of course, that they did not reduce emissions.

The Clean Air Act was amended in 1977 to address these shortcomings. The most important change was that nonferrous smelters were no longer allowed to use dispersion techniques to comply with the NAAQS. This in effect forced the industry to convert all reverbatory copper smelters and install pollution-control devices in the other smelters. Eleven of the 15 copper smelters in the United States at that time were reverbatory smelters, and thus major capital expenditures were forced on the industry.[62]

Realizing that it had imposed a major financial burden on the copper companies, Congress added a second amendment for companies that were technically or economically incapable of complying with the NAAQS. A Non-

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[61] There are also other important environmental regulations affecting the treatment of water, solid wastes, and health and safety concerns. Sousa, *U.S. Copper Industry*, p. 51.

[62] Reverbatory copper smelters were first introduced in 1879, but they are now considered obsolete because of their high energy consumption, inefficient heat-transfer system, and the difficulty of removing sulphur dioxide from the gases. Sousa, *U.S. Copper Industry*, p. 42. For a discussion of comparative smelting technologies, see Lottie Müller-Ohlsen, *Non-Ferrous Metals: Their Role in Industrial Development* (Cambridge, England: Woodhead-Faulkner/ Metallgesellschaft AG, 1981), pp. 41-48.

Ferrous Smelter Order (NSO) allows a company to use dispersion techniques for a five-year period while it installs the pollution-control devices necessary to comply with the NAAQS. An NSO waiver can be renewed once, but when it runs out the smelter must either meet the required standards or shut down.[63]

Two other amendments were also made to the Clean Air Act in 1977. The New Source Performance Standards require that new or modified smelters must use the best available control technology and be able to remove not less than 93.5 percent of sulphur dioxide emissions, and the Prevention of Significant Deterioration provisions are designed to limit the construction of new smelters in areas where the air is cleaner than required under the NAAQS. The Commerce Department and the copper companies complained that these provisions would prevent new smelters from being built because they would be forced to operate on an impractically small scale at high cost, but these provisions were not withdrawn.[64]

The combined effect of these regulations on the U.S. copper industry has been quite severe; they have required huge capital expenditures to be made, and they have forced some smelters to close. The economic costs of environmental-protection regulation have been manifested in a number of ways, the most direct of which has been the escalation in capital expenditures.[65] The cost of complying with federal regulations was clearly rising between 1979 and 1983: expenditures on environmental protection increased from $47.8 million to $135.1 million, and their share of *total* capital expenditures soared from 17.1 to 46.2 percent.[66]

The U.S. copper producers were also hurt economically in a number of less direct ways. For one thing, increased capital expenditures damaged the copper producers' competitive position by raising costs of production and operating costs. The House Committee on Energy and Commerce, for exam-

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[63] Raymond S. Hartman, Kirkor Bozdogan, and Ravindra M. Nadkarni, "The Economic Impacts of Environmental Regulations on the U.S. Copper Industry," *Bell Journal of Economics* (1979): 591-93.

[64] Sousa, *U.S. Copper Industry*, p. 50.

[65] Capital expenditures have risen so rapidly in the U.S. copper industry that it now spends more on pollution control than any other U.S. industry. Ibid., p. 55.

[66] ITC, "Unwrought Copper," p. A44.

ple, reported that the cost of complying with federal environmental regulations has added nine cents a pound to the cost of domestic copper.[67] The predicament of the copper companies was further complicated by the fact that these increased capital expenditures added to their debt load, thus making it harder for them to borrow or raise new capital. Nor have the environmental regulations made it easier for them to build new facilities or expand existing ones; the companies argue that they cannot expand their operations, because they are legally restricted from building more of the old-style smelters, and simply unable to afford the newer, cleaner ones.[68] In sum, the environmental regulations seem to have led to reduced productivity in the industry, as companies have been required to hire more employees and to use more energy to comply with the regulations.

The tough U.S. environmental laws have also contributed to the closure of many of the industry's smelters. In mid-1985 only eight of the 16 smelters that had existed in 1978 were still operating; two of them had closed permanently and six were shut down for an indefinite period.[69] The improvement in copper prices since then has allowed a few of these smelters to reopen, but the prospect of any of the others reopening is bleak.

Therefore, given the U.S. copper industry's frustration at having lost the 1978 and 1984 escape-clause cases, coupled with its environmental dilemma, it is understandable that it should have directed some attention toward seeking possible relief through another trade avenue. Nonetheless, this still begs the question of whether there has been subsidization of foreign copper companies to the extent assumed by the U.S. industry.

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[67] Congressional Research Services, *Competitiveness of American Metal Mining*, p. 34. The National Science Foundation, however, estimates that the cost of meeting EPA requirements without using secondary-dispersion techniques has increased copper production costs by 18 to 23 cents a pound! U.S. House of Representatives, Committee on Interior and Insular Affairs, Subcommittee on Mines and Mining, "Nonfuel Minerals Policy Review," *Hearings from Tuesday, 10 July 1979* (Washington: Congressional Investigative Service, 1980), H441-10.8, p. 164.

[68] Dorothea Mezger, *Copper in the World Economy* (New York: Monthly Review Press, 1980), p. 28.

[69] U.S. General Accounting Office, *Air Pollution: Sulfur Dioxide Emissions from Nonferrous Smelters Have Been Reduced*, Report to the Chairman, Subcommittee on Oversight and Investigation, Committee on Energy and Commerce, House of Representatives (Washington: U.S. Government Printing Office, April 1986), pp. 19, 32-33.

The existence of foreign subsidization is extraordinarily difficult to assess, because governments (with the possible exception of Canada's) are understandably reticent about publicizing any efforts they make to assist their domestic industries. Accordingly, there is a veritable dearth of published material relevant to this topic. Until further research closes this knowledge gap, analysts will be forced to rely on incomplete information.[70] In view of this, the comments that follow must be considered at best to be tentative.

Contrary to what might be assumed, the U.S. concern about subsidies for pollution-control purposes is not directed primarily against the countries of the Third World. These countries are simply too poor to be able to afford large-scale subsidization, and too dependent on copper exports to force additional costs on the industry. In other words, for most of them, the necessity of achieving higher levels of economic development takes precedence over protecting the environment. This is not to say, however, that these countries are completely oblivious to the pollution problem. Chile, for example, does encourage its copper industry to use cleaner production methods in new facilities or expansions of existing ones, but this encouragement is not backed by government subsidies and old smelters are not forced to retrofit.[71] Indeed, the International Trade Commission in its final report on the 1984 copper escape-clause case went so far as to declare that Codelco, the Chilean national copper company, "received no direct Government subsidies."[72]

The only real U.S. concern about subsidization of the copper industry in the Third World relates, as we have seen, to the lending practices of the multilateral development banks. The U.S. producers complain that these banks have not paid adequate attention to market conditions when making their loans and contend that this has contributed to the oversupply problem in the industry. The producers have succeeded in making this an issue in Congress, where a number of bills have been put forward to address their concerns. The 1985 Supplemental Appropriations Act (HR 2577), for

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[70] For an interesting attempt to catalogue some of the federal subsidies offered by the United States to its mining and other sectors, see Ann A. Michel et al., "An Annotated Inventory of Federal Business Subsidy Programs in the United States," *Discussion Paper in International Economics* (Ottawa: Institute for Research on Public Policy, May 1987).

[71] Sousa, *U.S. Copper Industry*, p. 55.

[72] ITC, "Unwrought Copper," p. A46.

example, would have forced U.S. directors of international financial institutions to oppose loans for copper-export activities, in addition to limiting U.S. contributions to those institutions when projects created international surpluses or displaced private initiatives.[73]

The U.S. copper producers have been more concerned about the environmental subsidies received by their competitors in the developed world. They realize that their competitors have comparable environmental laws, but allege that their rivals receive subsidies and other forms of assistance from their governments that give them an unfair competitive advantage. Japan and Canada, in particular, have drawn the gaze of U.S. producers, although complaints are also raised about the Europeans.

Like the United States, Japan has strong environmental laws that have imposed substantial costs on copper smelters. According to one estimate, the price of complying with these laws represents 20 to 30 percent of the total production costs of the Japanese industry.[74] Unlike Washington, however, Tokyo has been much more willing to assist its copper industry in meeting these costs, through the provision of loans, grants, tax incentives, contracts, and permit and licence approvals.[75] In addition, since 1973 the Metal Mining Agency of Japan has made subsidized loans and guarantees available to domestic companies that incurred commercial debts for installing pollution-control devices.[76] Thus, it would appear that the U.S. copper industry's complaints against Japan do have some foundation.

There is, however, one complaint raised by the U.S. copper producers that does not have much basis when applied to Japan. The producers assert that foreign subsidies for environmental protection convey the additional benefit of subsidizing the production of sulphuric acid.[77] The difficulty with this

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[73] *Canadian Minerals Yearbook 1985: Review and Outlook* (Ottawa: Energy, Mines and Resources Canada, 1986), p. 66.

[74] T.K. Corwin, "The Economics of Pollution Control in Japan," *Environmental Science and Technology* 14 (February 1980): 154-57.

[75] *Canada's Non-Ferrous Metals Industry: Nickel and Productivity* (Ottawa: Energy, Mines and Resources Canada, 1984), p. 34.

[76] Sousa, *U.S. Copper Industry*, p. 56.

[77] The use of environmental-protection devices in the smelting of copper facilitates the removal of sulphur dioxide from the ore. Once separated, the sulfur dioxide can easily be processed

assertion - and its corollary assumption that without such subsidization the Japanese smelters would be a less viable source of supply of sulphuric acid - is that it overlooks a critical natural advantage Japanese producers have over their rivals in the United States. Simply stated, the Japanese copper smelters are located near the main markets for sulphuric acid in their region (namely, fertilizer producers), whereas the U.S. copper producers are geographically distanced from theirs. This is an important distinction because the costs of transporting sulphuric acid are relatively high. In other words, subsidies have little to do with Japan's success in this commercial endeavour.[78]

The situation in Canada is somewhat different from that either in Japan or the United States. Unlike the latter country, Canada does not have a national law relevant to the reduction of emissions from copper smelters. Instead, the Canadian approach involves much more cooperation between the government and industry, with the result tending to be mutually agreed-upon targets that are both practical and attainable. Furthermore, there is much greater involvement on the part of the provincial governments in the regulation of copper smelters. The effect of this is that pollution-control targets are usually unique for each smelter. Thus, one must consider both federal and provincial programs if one is to find examples of Canadian "subsidization."

A cursory examination of these programs would indicate that U.S. complaints about Canada might have some basis; both the federal and provincial governments have contributed to the cost of installing pollution-control devices in Canadian copper smelters. Ottawa and the provincial governments did not become significantly involved in the efforts to reduce emissions from copper smelters until March 1984, when federal and provincial environment ministers agreed to cut sulphur dioxide emissions in half by 1994. Ottawa further agreed to take the lead in controlling emissions from nonferrous smelters, while the provinces would concentrate their efforts on the thermal power sector.[79]

As a result of this accord, the provincial governments moved ahead with their own abatement programs. In February 1985 Quebec announced that it would require Noranda's Gaspé and Horne smelters to contain 65 and 50

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into sulphuric acid and sold to fertilizer producers. Interview, Toronto, 24 May 1985.

[78] Sousa, *U.S. Copper Industry*, p. 56.

[79] *Canada's Non-Ferrous Metals Industry*, p. 52.

percent respectively of their emissions by 1990.[80] Similarly, on 17 December 1985 Ontario revealed that the Inco and Falconbridge smelters at Sudbury would have to reduce their sulphur dioxide emissions by 67 percent by 1994.[81]

The federal and provincial governments realized that these regulations would force large capital expenditures on the copper companies, and they indicated their willingness to help the copper companies cover these costs. Thus, on 6 March 1985 Ottawa announced that it would spend up to $150 million to reduce sulphur emissions from nonferrous smelters.[82]

The exact allocation of this money was the subject of negotiation for the next two years, but in March 1987 agreements were reached between Ottawa and Ontario and Quebec. In the case of Ontario, Ottawa and Queen's Park each pledged to provide up to $85 million for the installation of pollution-control devices in the province's copper smelters.[83] This money, which constituted a sort of "line of credit," was never actually disbursed to the Ontario smelters owned by Inco and Falconbridge. A similar arrangement was undertaken with the government of Quebec later that month, calling upon the two governments to contribute to the $125 million cost of building a new acid plant at Noranda's Horne smelter.[84] Thus, given that at least one of the five copper smelters in Canada has received substantial government assistance to build an acid plant, and that one more (Flin Flon) remains eligible for assistance, it appears that the complaints of the U.S. copper producers do have some basis.

Against these claims, however, one must place some political realities that, taken in context, will likely deter the U.S. copper producers from filing a CVD petition. Foremost among these realities is the emerging - albeit slowly, from the Canadian perspective - consensus on the bilateral campaign against acid rain. The recent proposal of the Governors of New York and Ohio, Mario

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[80] Government of Canada, Department of Energy Mines and Resources, *Canadian Mining Industry Monthly Report*, March 1987, p. 10.

[81] "Environment Ministers Sign Acid Rain Agreement," Ontario Ministry of the Environment Communiqué, 10 March 1987, p. 2.

[82] *Countdown Acid Rain: Ontario's Acid Gas Control Program for 1986-1994* (Toronto: Ontario Ministry of the Environment, 1986), p. 5.

[83] *Canada/Ontario Agreement Respecting a Sulphur Dioxide Reduction Program*, 10 March 1987, p. 4.

[84] *Canadian Mining Industry Monthly Report*, March 1987, p. 10.

Cuomo and Richard Celeste, to achieve a 43-percent reduction in U.S. sulphur dioxide emissions by 2003 could have the indirect effect of rendering less worrisome any future threat of countervailing duties, for at least two reasons. First is that a Congress committed to serious reductions in acid rain is hardly likely to be a Congress sympathetic to penalizing Canadian exporters whose production has been "subsidized" for the very good cause of reducing sulphur dioxide emissions. The second reason is that the Cuomo-Celeste plan, which is likely to be introduced as amendments to the Clean Air Act, will require a significant degree of subsidization if it is to realize its objective.[85] Because of the importance to this case of the issue of subsidization, we conclude this chapter with a brief discussion of the concept's role in U.S. trade law.

Conclusion

One of the questions that has arisen since the Trade Agreements Act of 1979 is whether a domestic subsidy is generally available or restricted for the use of a specific enterprise, industry, or region. Generally available domestic subsidies do not convey comparative advantage within a country and their effects are thought to be neutralized by floating exchange rates, thus they are not actionable under U.S. law. However, domestic subsidies that are available only to specific companies, industries, or regions are actionable because they are thought to distort the market. The ITA conducts a "specificity test" to distinguish these types of subsidies, and an affirmative ruling is made whenever the stated goal of a subsidy program is to aid a specific industry or when the benefits or a program disproportionately benefit a particular industry. Although the Canadian program for smelter cleanup was available to the entire nonferrous minerals industry, it is unlikely that the ITA would view this program as being generally available. It was, after all, available to only one stage of production within that industry, and was in practice only granted to either nickel or copper smelters.

Another controversial issue in U.S. trade law concerns "upstream subsidies." These are subsidies provided for an input (e.g. coking coal) used in producing another product (e.g. steel) that is exported to the United States and under investigation in a countervailing duty case. To make an affirmative ruling, the

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[85] See "Winds of Change on Acid Rain," *Christian Science Monitor*, 13-19 June 1988, p. 31; and Philip Shabecoff, "State Acid Rain Acord Puts New Pressure on Washington," *New York Times*, 12 June 1988, p. E4.

ITA must find that an upstream subsidy conveys a competitive benefit on the product under investigation (normally through low input prices) and that this has a significant effect on the cost of that product. The Canadian copper industry could be affected by this type of case should the U.S. producers of sulphuric acid or fertilizers launch a countervailing duty case against Canada. It could be alleged that Canadian subsidies for pollution-control devices on copper smelters are an upstream subsidy for the Canadian producers of these products. There would need to be some evidence that the copper producers passed on their subsidies in the form of lower prices, but if this were so, the Canadian industry might be menaced by a countervailing duty.

Regional development grants are another area of controversy in U.S. trade law. These grants are not classified as subsidies within the GATT because Article 11 of the Subsidies Code acknowledges the right of countries to make such grants, but since the Trade Agreements Act of 1979 U.S. law has found these to be countervailable. Thus, even if the Canadian and Ontario governments had declared their subsidies to be part of a regional development program for Northern Ontario, they still might not avert a possible countervailing duty case.

In view of these factors, we cannot be certain that the potential threat of countervailing duties will be lifted - and this even with the Free Trade Agreement having entered into effect early in 1989. It is conceivable, though not likely, that U.S. copper companies could garner support for their complaint that government assistance to protect the environment constitutes an unfair subsidy, and in any event their interest in obtaining relief through this trade-remedy law could well intensify in the coming decade. Thus, we could be left with the curious contradiction of the greatest threat to the Canadian copper industry coming from the same country that created the Superfund program for toxic cleanups!

But as we saw in the case of potash, political considerations have a way of intruding frequently upon market forces, an observation that has been particularly apropos of uranium, to which we now turn.

5. Uranium: The National-Security Argument and Bilateral Trade

Introduction

In early June 1986 a U.S. District Court for the District of Colorado, presided over by Judge James Carrigan, rendered a decision with potentially profound impact on Canadian uranium exports to the United States. In the view of the Court, the Department of Energy (DOE) was failing to fulfil its obligation, under Section 161(V) of the Atomic Energy Act of 1954, to take such measures as the restricting of enrichment services for foreign-sourced uranium intended to be consumed by U.S. utilities. The Court, as a result, ordered the DOE to limit the enrichment of such uranium to 25 percent of all materials enriched from 6 June to 31 December 1986, and to enrich no foreign-sourced uranium after 1 January 1987. These rather severe enrichment provisions were decreed to be in accordance with the DOE's stipulated obligation to guarantee the maintenance of a viable domestic uranium industry.

DOE appealed this decision to the U.S. Court of Appeals for the Tenth Circuit by whom it also was granted a stay of the initial court order, pending the outcome of the appeal. Slightly more than a year later, on 20 July 1987, the appeals court reached its decision, and it was further bad news for both the DOE and Canadian (and other foreign) suppliers of uranium to the U.S. market: the Court of Appeals affirmed the District Court's grant of summary judgement on the matter. It did, however, issue a stay of its mandate pending a decision of the U.S. Supreme Court, to which the case would subsequently be sent.[1] On 15 June 1988 the highest court in the land, in a unanimous

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[1] See Supreme Court of the United States, *Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit* (October Term, 1987). Also see Eric Lindeman et al., "DOE Pinning Hopes on U.S. Supreme Court to Reverse Decision on Import Limits," *Nuclear Fuel*, 27 July 1987, pp. 1-5; John Kohut, "U.S. Supreme Court Agrees to Decide if

decision, reversed the appeals court ruling, and sent the case back to the Colorado District Court, whence it had originated. In effect, the Supreme Court had decided that the administration was correct in interpreting the statute as not requiring *automatic* import restrictions in the event of a "non-viability" finding on the part of the Secretary of Energy, a complex matter that we explain below. But the Supreme Court at the same time rejected the argument made by the administration - that is, by the DOE - that an enrichment embargo would not be able to restore the domestic uranium industry to health. That question, the jurists decreed, might properly be settled back in the Colorado District Court.[2]

For the moment, the legal challenge - a challenge that just two years ago loomed as a real and immediate danger to Canadian export interests - has ended, due to a combination of the Supreme Court decision and the Free Trade Agreement. By late 1988, after the Mulroney election victory ensured the implementation of the FTA, the U.S. uranium-mining interests dropped the court challenge, effectively throwing in the towel insofar as concerned the (re)imposition of an enrichment embargo.[3] Although, as we shall relate below, there do remain some statutory hurdles facing Canadian exporters, the likelihood is that the Free Trade Agreement will continue to have a dampening effect upon any attempts to inhibit the southward flow of uranium, even if such efforts are made through the invocation of national security. We return to the complicated series of events that culminated in the Supreme Court decision later in this chapter. In what follows immediately, however, we present a rather theoretical discussion of U.S. policy regarding strategic minerals - of which uranium is perhaps the most compelling example - over the past several decades.[4] We do so because it is impossible, in our view, to understand the convoluted history of bilateral uranium trade between Canada and the United States without taking into account the "national security"

Uranium Exports Hurt U.S. Industry," *Globe and Mail*, 15 March 1988, p. B4; and U.S. Department of Energy, *Domestic Uranium Mining and Milling Industry 1987: Viability Assessment* (Washington: Energy Information Administration, December 1988), p. 3. (Hereafter cited as DOE, *1987 Viability Assessment*.)

2 Interview, Washington, 12 June 1989.

3 Interview, Washington, 13 June 1989.

4 For a definitional essay on strategic minerals, see David G. Haglund, "Strategic Minerals: A Conceptual Analysis," *Resources Policy* 10 (September 1984): 146-52.

argument. This does not mean we consider imports of Canadian uranium into the U.S. market to constitute a security challenge to Washington. Rather, it is simply to recognize that uranium is a mineral *pas comme les autres*, and the reality is that its commerce has for decades been regulated primarily not by trade law but by national-security legislation. Readers who prefer a less theoretical account may wish to skip the following two sections.

Minerals and Mercantilism: Some Theoretical Issues

It is a common complaint among economists and trade lawyers that states have been becoming exceedingly clever in developing stratagems to justify and facilitate their interference with "normal" trading patterns; minerals are no exceptions to the trend. One of the oft-cited motivations for introducing market distortions has been the national-security argument, pilloried by *The Economist* (not without some reason) as "the last refuge of a protectionist scoundrel."[5] National security constitutes one, but by no means the most omnipresent, of the political factors that have been implicated in the recent wave of "neo-mercantilist" protectionism that, as we discussed in chapter 1, seems to be now rolling over the Western developed countries. Though the analogy, as with most such comparisons, may be inexact, there is nevertheless some merit in introducing the concept of modified "mercantilism" into the discussion; for mercantilism was a perspective on international political economy that put great stress on the distributive characteristics of both power and wealth - both of which were held to represent the *summum bonum* of statecraft.[6] In short, the world of the mercantilists was a zero-sum world, in which an adversary's loss, whether in a political or economic context, was held to be identical to one's own gain. The reason we suggest a partial analogy between the political-economic ethos of the world of two or three hundred years ago and that of today is that we can discern a continued stress on the distributive aspects of these two ends of statecraft: power and wealth. Indeed, we are constantly being told that the international political economy

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5 "Japan's Protected Telecoms," *The Economist*, 3-9 January 1987, pp. 12-13.

6 It is commonly thought that, during the heyday of mercantilism, states sought power above all else. To this view, Jacob Viner brought some useful correction in his seminal article, "Power versus Plenty as Objectives of Foreign Policy in the Seventeenth and Eighteenth Centuries," *World Politics* 1 (October 1948): 1-29.

is showing dangerous signs of reverting to mercantilist patterns; and some International Political Economy (IPE) text writers have chosen to label the contemporary era one of neo-mercantilism.[7]

One of the important questions with which specialists in IPE wrestle today is the degree to which states - given their tendency to put the national interest above any international one - can cooperate in such a way as to preserve the mutual benefits that can flow from their interdependence.[8] Few political scientists (although sometimes our economist colleagues will dispute this) really do need convincing that liberalized trade can enhance global productivity and thus raise global levels of welfare. The problem with political scientists is that they tend to stress the structural and subsystemic features of both international and domestic politics that constrain the prospects of collaboration and harmony; especially is this true of that group of international relations specialists who find conceptual succour in a body of theory broadly referred to as "realism."[9]

At the subsystemic level, that of the nation-state, it has been apparent for some time that states (and their leaders) are painfully resistant to abrogating the prerogatives of "sovereignty" in favour of collaboration in pursuit of great objectives - save in those rare moments when such resistance might threaten the continued survival of the state. And even when "survival interests" might be held to be at stake, it is far from clear that the path of collaboration (usually meaning, in this context, the formation of military alliances) will be

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7 David H. Blake and Robert S. Walters, *The Politics of Global Economic Relations*, 2d ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1983), pp. 18-21.

8 See especially the important work by Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984). Also see Kenneth A. Oye, ed. *Cooperation under Anarchy* (Princeton: Princeton University Press, 1986).

9 Perhaps the best introduction to the classical "realist" prospective remains E.H. Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (London: Macmillan, 1939). Recently, a lively little debate has been raging over the conceptual basis, and normative standing, of contemporary realism (usually referred to in some modified version, such as "structural" realism or "neorealism"). A good starting point for this debate is Robert O. Keohane, ed., *Neorealism and its Critics* (New York: Columbia University Press, 1986).

chosen.[10] When the interests at stake are less than of a survival nature, and are more concerned with welfare, then the prospects of collaboration can become even more tenuous. Although he was writing about international monetary relations and not trade, Benjamin Cohen aptly observes that too many of his fellow economists fall victim to the fallacy of composition in assuming that states will (or should) see that what is best for the world as a whole will also be best for each state individually. Sovereignty, perhaps because it is a variable impossible of quantification, all too often gets neglected in analyses characterized at one and the same time by both economic brilliance and political naïveté. "Governmental policy is not," chides Cohen, "in the hands of economists with a disinterested concern in the maximization of global welfare. It is in the hands of politicians with a very interested concern ... in the maximization of national welfare, as well as of national autonomy and prestige. The point bears repeating: distributional considerations matter."[11]

Those who follow trade, and not monetary, affairs will need no convincing that politics can indeed be an instrument of economics. Recent years have witnessed near-constant bickering on the part of many of the important members of the Western alliance, as if in confirmation of the views of the pessimistic theorists of interdependence that one's military allies tend, because of the incidence of interdependent ties between alliance members, to be one's primary economic rivals. This situation appears to reverse Lenin's assumption regarding the fundamental connection between economic and security imperatives: namely, that the former tend to be antecedent to, and necessarily corrosive of, the latter.[12] Still, we may be living in a world that at least

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[10] An analysis that seeks to establish categories for varying national interests, including survival ones, is Donald E. Nuechterlein, *America Overcommitted: United States National Interests in the 1980s* (Lexington: University Press of Kentucky, 1985).

[11] Benjamin J. Cohen, *Organizing the World's Money: The Political Economy of International Monetary Relations* (New York: Basic Books, 1977), p. 60.

[12] On the potential for interdependence to contribute to the exacerbation of international tension, see Edward L. Morse, *Modernization and the Transformation of International Relations* (New York: Free Press, 1976); and Andrew M. Scott, *The Dynamics of Interdependence* (Chapel Hill: University of North Carolina Press, 1982). Lenin's famous argument that economic rivalry among states (capitalist ones, it goes without saying) leads to war between them is found in his 1916 work, *Imperialism: The Highest Stage of Capitalism* (New York: International Publishers, 1939).

partially resembles that of Lenin's imaginings; and if so, there are indeed reasons for pondering whether the current menace of "trade wars" might not yet contribute to, at minimum, a deterioration of the post-World War II international security structure constructed more or less under the aegis of the United States.[13]

This at least seemed to be the worry of many in the Reagan administration, as exemplified by an interesting speech that the U.S. Ambassador to West Germany, Richard Burt, made early in 1987. Burt illustrated the manner in which economic friction could spill over into the security arena, and directed his remarks particularly at recent trade rivalry between the European Community and the United States (though the same points could apply, *mutatis mutandis*, in respect of Japan as well). "It is essential," said the Ambassador, "to recognize there is an important connection between U.S.-European economic relations and the security of the alliance." Not only did protectionism erode economic vitality, and hence reduce military potential, but "equally important, serious frictions in our economic relations could spill over into the political realm and would undermine the cohesion of the alliance at a potentially important moment in East-West relations."[14] Nor does the Bush administration, as it nervously contemplates the "Europe 1992" project, turn a blind eye toward the potential security damage that could be done to the West in the event a European unification impetus were to be attended by the erection of barriers against U.S. economic interests.

Trade friction may be growing among the OECD countries, but worry about the politico-security consequences of such friction has been evident for at least the past 15 years. Such worry eventually has a way of focusing on the future of NATO; and with regard to the alliance it is surely a truism to remark that relations between the member states are fraught with tension, on

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[13] Theorists of "hegemonic stability" argue that an essential precondition for the successful creation and maintenance of a liberal economic order is that a great power ("hegemon") take on the burden of running the system. See Robert Gilpin, *War and Change in World Politics* (Cambridge: Cambridge University Press, 1981). Some today worry that the United States is no longer either able or willing to continue to sustain the postwar economic order it was instrumental in fostering. See, for a lucid analysis of this prospect, C. Fred Bergsten, "Economic Imbalances and World Politics," *Foreign Affairs* 65 (Spring 1987): 770-94. Also see Paul Kennedy, *The Rise and Fall of the Great Powers* (New York: Random House, 1987); and David P. Calleo, *Beyond American Hegemony*.

[14] "Trade, Defense Linked," *Journal of Commerce* (New York), 12 February 1987, p. 5.

a range of issues extending from nuclear arms to Central America.[15] But then the Western alliance has been marked by stress and strain ever since its inception; and it is likely that it will continue to demonstrate that, in the manner of Mark Twain, reports of its death have been exaggerated.[16] The height of nervousness over the *political* effect of economic discord was probably reached during the oil "crises" of the 1970s, when it was widely feared that divergent approaches to both the Arab-Israeli and producer-consumer problems would distance the United States further from its European allies.[17] This is not to belittle the current prospects of economic bitterness spilling over into the arena of security. Such prospects do seem real, and it may well be that the future of the postwar liberal economic order is not going to be a pleasant one, with all that this entails for international trade in resources and other goods.[18]

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[15] For a discussion of contemporary problems confronting the alliance, see Melvyn Krauss, *How NATO Weakens the West* (New York: Simon and Schuster, 1986); Andrew J. Pierre, ed., *Nuclear Weapons in Europe* (New York: Council on Foreign Relations, 1984); Pierre, ed., *Third World Instability: Central America as a European-American Issue* (New York: Council on Foreign Relations, 1985); Joseph Cirincione, ed., *Central America and the Western Alliance* (New York: Holmes & Meier, 1985); Eliot A. Cohen, "The Long-Term Crisis of the Alliance," *Foreign Affairs* 61 (Winter 1982/83); Earl C. Ravenal, "Europe without America: The Erosion of NATO," *Foreign Affairs* 63 (Summer 1985): 1020-35; and Christopher Layne, "Continental Divide: Time to Disengage in Europe," *National Interest*, no. 13 (Fall 1988): 13-27.

[16] For an examination of some of the major problems affecting alliance harmony in previous decades, see Michael Smith, *Western Europe and the United States: The Uncertain Alliance* (London: George Allen & Unwin, 1984). On the perceived threat to security presented by economic rivalry at the start of the 1970s, see David P. Calleo and Benjamin M. Rowland, *America and the World Political Economy: Atlantic Dreams and National Realities* (Bloomington: Indiana University Press, 1973).

[17] Robert Pfaltzgraff, *Energy Issues and Alliance Relationships: The United States, Western Europe and Japan* (Cambridge, Mass.: Institute for Foreign Policy Analysis, 1980); Garret Fitzgerald, et al., *The Middle East and the Trilateral Countries*, Triangle Papers: 22 (New York: Trilateral Commission, 1981).

[18] A rather bleak assessment of the future of the multilateral trading system is offered by Michael C. Webb and Mark W. Zacher, "Canadian Export Trade in a Changing International Environment," in *Royal Commission on the Economic Union and Development Prospects for Canada*; vol. 28: *Canada and the International Political/Economic Environment*, ed. Denis Stairs and Gilbert R. Winham (Toronto: University of Toronto Press, 1985), pp. 85-150.

But even if the NATO or OECD countries were not giving the impression of being at daggers drawn over trade, there is still a reason to take seriously the proposition that security worries might have the effect of distorting the pattern of resource trade, at least in some commodities. Theorists of international politics have tended to isolate "anarchy" as the single feature of the international political system that most sets that system apart from domestic polities.[19] Because no one is in charge of the zoo, it is argued, the animals must constantly be on guard for their very lives. And even if, as many theorists are prepared to concede, international anarchy need not take on the dimensions of a Hobbesian fight of all against all, there is still a clear enjoinment that the system sets upon its members: look to your security, a task that must require - at least for the more capable members of the international system - a great degree of "self-help."[20]

It is the security imperative of self-help that poses the trade-distorting problems which we have indicated can be and are associated with what has been termed the "supply effect" of resources trade. Briefly, the supply effect refers to the enhancing of a state's military capability through trade links that confer upon it more plentiful, or less expensive, goods. Trade, in other words, can not only make an economy richer, but (in doing so) make it more capable of developing and sustaining greater military power. But there is a paradox associated with the growth of trade; for the spread of commercial interdependence can also trigger worries about the security effects of interdependence.[21] Kenneth Waltz explains why it is that, in a self-help system, states often subordinate considerations of the economic gain to be had from interdependence to concern for security: "The high interdependence of states means that the states in question experience, or are subject to, the common vulnerability that high interdependence entails. Like other organizations, states seek to

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[19] Kenneth N. Waltz, *Man, the State and War: A Theoretical Analysis* (New York: Columbia University Press, 1959).

[20] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977).

[21] Clark A. Murdock, "Economic Factors as Objects of Security: Economics, Security and Vulnerability," in *Economic Issues and National Security*, ed. Klaus Knorr and Frank N. Trager (Lawrence: University Press of Kansas, 1977), pp. 67-98. Also see Edward Mead Earle, "Adam Smith, Alexander Hamilton, Fredrich List: The Economic Foundations of Military Power," in *Makers of Modern Strategy: From Machiavelli to the Nuclear Age*, ed. Peter Paret (Princeton: Princeton University Press, 1986), pp. 217-61.

control what they depend on or to lessen the extent of their dependency. This simple thought explains quite a bit of the behaviour of states: their imperial thrusts to widen the scope of their control and their autarchic strivings toward greater self-sufficiency."[22]

So far, we have been arguing that international politics affects trade for two principal reasons: first, because politics becomes an instrument of economics, as states seek to achieve the most favourable distribution of gain that they can, in a bid to increase their own national *welfare*; and secondly, because economics can be an instrument of politics, in the context of our argument, principally through its supply effect. Let us now turn to the manner in which resources - and mineral resources, above all - have been regarded as indispensable building blocks of international power.

Minerals and Military Potential: Interdependence or Autarchy?

Minerals are far from the only traded goods to have stimulated security fears, as a result of states' heightened dependence upon foreign sources of supply; but there is a sense in which minerals do constitute "basal" elements of industrial development, and thus it can be argued that shortages in this group of industrial goods can have a perturbing effect on a country's processing, or "downstream," sectors.[23] But vulnerability concerns associated with interdependence extend beyond the raw-material sphere, and lately there has been an increase, especially in the United States, in the attention accorded to the ways in which trade deficits can serve as symptoms for what some see as a far graver problem: the loss of productive capacity in a broad range of sectors of what has been termed the "defence industrial base."[24] According to some

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[22] Kenneth N. Waltz, *Theory of International Politics* (Reading, Mass.: Addison-Wesley, 1979), pp. 105-6.

[23] John E. Tilton, *The Future of Nonfuel Minerals* (Washington: Brookings Institution, 1977), p. 91. Also see John E. Tilton and Hans H. Landsberg, "Nonfuel Minerals - The Fear of Shortages and the Search for Policies," in *U.S. Interests and Global Natural Resources: Energy, Minerals, Food*, ed. Emery Castle and Kent A. Price (Washington: Resources for the Future, 1983), p. 50.

[24] For an attempt to specify the economic sectors embraced by this concept, see U.S. Congress, House Committee on Armed Services, *The Ailing Defense Industrial Base: Unready for Crisis*, 96th Cong., 2d sess. (Washington: U.S. Government Printing Office, 1980). Also see, for

U.S. national-security analysts who are disturbed by recent trends regarding trade balances, the primary danger is not so much an economic but a security one; and thus the debate between the neo-mercantilists and free-traders is held to be missing the point. Writes one such analyst, Paul Seabury: "the necessity for a U.S. industrial policy arises not from domestic economic considerations - however large these may currently loom - but rather from strategic-military concerns. As the only genuine guarantor of security for both itself and the Free World as a whole, the United States simply cannot afford to allow its industrial base to wither away."[25]

Allusion has been made above to the potential for a brewing trade war between the United States and its European trading partners, or Japan, or both, to spill over from the realm of economics to that of security, with potential significant consequences for the politico-military relations between the United States and those countries.[26] To a large degree, these trade disputes point up the way in which politics can interfere with economic processes when states seek, in neo-mercantilist fashion, to increase their own welfare by imposing costs upon their trading partners through external adjustment measures. But at least some of the latest U.S. disquiet with Japan stems from a fear that interdependence, if left unchecked by state policy, will strip the United States of an indispensable cog in its defence industrial base, its semiconductor industry. It is simply incorrect to interpret, as many are wont to do, recent U.S. tariffs on Japanese electronic goods as solely attributable to the pressure of influential U.S. companies no longer able to compete internationally.[27] Similar concern for security was at play in the spring of

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the application of this concept to the Canadian context, John M. Treddenick, "The Economic Significance of the Canadian Defence Industrial Base," in *Canada's Defence Industrial Base: The Political Economy of Preparedness and Procurement*, ed. David G. Haglund (Kingston: Ronald P. Frye, 1988), pp. 15-48.

25 Paul Seabury, "Industrial Policy and National Defense," *Journal of Contemporary Studies* 6 (Spring 1983): 6.

26 One potential implication could be the rise of Japan as a military power in its own right. See Ian Buruma, "A New Japanese Nationalism," *New York Times Magazine*, 12 April 1987, pp. 23-29ff.

27 "Pentagon Task Force to Propose Chip-Aid Plan," *Journal of Commerce*, 9 January 1987, p. 5: "The U.S. semiconductor industry has been devastated by Japanese competition and may need government money to survive... The rapid erosion of the United States' chip-making ability threatens U.S. leadership in the entire field of electronics and threatens national

1986, when the Reagan administration, availing itself of the same national-security provision of U.S. trade law that sustains the Department of Commerce's current investigation into uranium imports from Canada, imposed trade restrictions on machine-tool imports entering the United States from Taiwan, the Federal Republic of Germany, Japan, and Switzerland.[28]

If minerals, then, are not the only products that have occasioned resort to "autarchic strivings," it can still be said of them that they were the first industrial goods in this century to trigger widespread security concerns because, in an earlier era that saw all of the major powers virtually self-sufficient in the major downstream industries (e.g. steel), minerals remained a problematical sector for all but a very few countries, which happened to be favoured by nature with abundance in raw materials. For most industrialized countries, however, interdependence in resources was a fact of life long before interdependence in other industrial commodities began to become apparent; thus the security worries that interdependence in finished products has been stimulating today have long been apparent in minerals and other resources.

The First World War has been seen as a watershed by those who have studied the "geopolitics" of minerals.[29] To the extent that conflict conveyed a clear lesson, it seemed to be this: that modern wars of attrition would be won by those states (or coalitions) that had the greatest "military potential," and lost by those that, whatever the quality of their leadership or the degree of their national cohesiveness, lacked the capability to sustain themselves in lengthy combat. In earlier usage, military potential was often referred to as "war potential"; but whichever label is used, what is being connoted is the concept of a reserve of "national resources available for producing and

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security..." U.S. disquiet over high import dependence in semiconductors is analyzed in David G. Haglund, with Marc Busch, "'Techno-Nationalism' and the Contemporary Debate over the American Defence Industrial Base," in *The Defence Industrial Base and the West*, ed. David G. Haglund (London: Routledge, 1989), pp. 210-48.

[28] The provision is a section of the Trade Expansion Act of 1962, S.232. See "Reagan to Seek Cutbacks on Machine-Tool Imports," *Washington Post*, 21 May 1986, p. G1; and White House, Office of the Press Secretary, Statement by the President regarding Voluntary Restraint Agreements on Machine Tool Imports, 20 May 1986.

[29] David G. Haglund, "The New Geopolitics of Minerals: An Inquiry into the Changing International Significance of Strategic Minerals," *Political Geography Quarterly* 5 (July 1986): 221-40.

maintaining armed forces. Whenever a nation creates or expands military forces in peace and war, it mobilizes military potential."[30]

Though not the sole constituent of military potential, the capacity for industrialization was held by most analysts of security during the interwar period to be far and away the most relevant consideration in determining international distribution patterns of power. During this same period, assured access to minerals was held to be a *sine qua non* of industrialization. As one minerals analyst put it, in the immediate aftermath of World War I: "[T]he presence of minerals within the boundaries of a state is a fundamental, unalterable advantage to that country, and their absence a fundamental, unalterable drawback. A country that has little or no mineral resources is in a position of insuperable disadvantage as compared with a country that has a sufficiency of the essential minerals. There is no certain way to overcome this disadvantage, although it may be to some extent alleviated by trade at the sufferance of the dominant states."[31]

Assuring access to raw materials became a major foreign-policy consideration of states during the interwar period. For the self-declared "have-not" countries (Germany, Italy, and Japan) it became a veritable obsession.[32] Minerals-access questions have been cited as, at the very least, contributing factors in the dissolution of international order during the 1930s. Some analysts argue that minerals-acquisition strategies of certain countries led directly to the outbreak of World War II.[33] Whether one adopts the stronger

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[30] Klaus Knorr, *Military Power and Potential* (Lexington, Mass.: D.C. Heath, 1970), p. 15. Also see Knorr, *The War Potential of Nations* (Princeton: Princeton University Press, 1956).

[31] George Otis Smith, ed., *The Strategy of Minerals: A Study of the Mineral Factor in the World Position of America in War and in Peace* (New York: D. Appleton, 1919), p. 26.

[32] C.K. Leith, "Mineral Resources and Peace," *Foreign Affairs* 16 (April 1938): 515-24; Leith, *Minerals in the Peace Settlement* (New York: Geological Society of America, 1940); Hjalmar Schacht, "Germany's Colonial Demands," *Foreign Affairs* 15 (January 1937): 223-34; Robert Strausz-Hupé, *Geopolitics: The Struggle for Space and Power* (New York: Putnam's 1942); Herbert Feis, "Raw Materials and Foreign Policy," *Foreign Affairs* 16 (July 1938): 574-86; Brooks Emeny, *The Strategy of Raw Materials: A Study of America in Peace and War* (New York: Macmillan, 1934); Stephen D. Krasner, *Defending the National Interest: Raw Materials Investments and U.S. Foreign Policy* (Princeton: Princeton University Press, 1978); Ludwell Denny, *We Fight for Oil* (New York: Alfred A. Knopf, 1928).

[33] Simon D. Strauss, *Trouble in the Third Kingdom: The Minerals Industry in Transition* (London: Mining Journal Books, 1986), pp. 158-59; T. S. Lovering, *Minerals in World*

or weaker version of the thesis that minerals maldistribution bore a causal relation to the origins of the Second World War, it is apparent that ever since the interwar years, raw-material competition has not been seen to be as crucial a consideration in international politics. This is so even though there were, during the late 1970s and early 1980s, numerous attempts on the part of jittery analysts to depict the two superpowers as having been engaged in a Soviet-inspired "resource war," the stakes of which were held by some at the time to be nothing less than domination of the planet.[34]

U.S. Mineral Policy: The Question of Security

It is ironical that one of the lessons to emerge from World War II - a war at least partly caused by minerals-related "imperial thrusts" and "autarchic strivings" - should have reversed the above-discussed lesson of World War I. It now seemed as if the earlier, deterministic, equating of industrial capacity with raw-material possession needed to be modified. So argued Edward S. Mason, who drew an analogy between what Nazi Germany had accomplished in terms of military potential during the war and what the new, post-war "have-nots" might also accomplish; in particular, the United States, which many were beginning to fear had so depleted its resources fighting the war that it must lose its vaunted relative independence in minerals. In a celebrated article that appeared in the inaugural volume of *World Politics*, Mason

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Affairs (New York: Prentice-Hall, 1943); Alfred E. Eckes, *The United States and the Global Struggle for Minerals* (Austin: University of Texas Press, 1979), p. 58; Robert C. North, "Toward a Framework for the Analysis of Scarcity and Conflict," *International Studies Quarterly* 21 (December 1977): 584.

[34] For a sampling of the more dramatic statements of the resource-war hypothesis, see: *The Resource War in 3-D - Dependency, Diplomacy, Defense*, ed. James Arnold Miller, Daniel Fine, and R. Daniel McMichael (Pittsburgh: World Affairs Council of Pittsburgh, 1980); National Strategy Information Center, *The Resource War and the U.S. Business Community: The Case for a Council on Economics and National Security* (Washington: Council on Economics and National Security, 1980); Warren P. Baker, "Next: A Resource War?" *Seapower* 23 (October 1980): 55-61; and W.C.J. van Rensburg, "Political Change in South Africa and the Importance of the Republic of South Africa as a Raw Material Supplier" in *Probleme der Rohstoffsicherung* (Bonn: Friedrich Ebert Stiftung, 1981), pp. 95-100. For a critical assessment of these theories, see Jock A. Finlayson and David G. Haglund, "Whatever Happened to the Resource War?," *Survival* 29 (September/October 1987): 403-15.

noted that although Germany's consumption of essential minerals had remained unchanging from 1938 to 1944, its military production had actually increased by 300 to 400 percent. "[I]t is quite clear," he concluded, "that Germany managed to fight a first-class war on very small quantities of 'essential' raw materials ... The moral, for our purposes, seems to be that the potentialities of raw material substitution and replacement in a modern economy are enormous."[35]

The industrial economies of the post-World War II decades, it seemed, would be freed of the geographical constraints that analysts of the previous generation had imagined must limit the ranks of the great powers to those lucky enough to approximate minerals self-sufficiency. In the process, military potential was liberated from its bonds of geographical determinism. Mancur Olson was one of the new breed of analysts who remarked the diminished relevance of mineral possession to military potential. Earlier deterministic statements of the relationship were examples, said Olson, of the "physiocratic fallacy," in that they proceeded from the erroneous assumption that all wealth flowed from the production of primary goods. To Olson, "the experience of the two world wars and a glance at the opportunities for substitution reveal that shortages of primary products need not always be fatal to a nation at war."[36]

Far less qualified than Olson's was the view articulated a decade later by Charles L. Schultze, who, a few months before the first oil "crisis" of the 1970s, advanced the contentious proposition that "the national security of the United States depends in no important way on securing access to raw materials, markets, or sea lanes abroad, and securing or protecting such access cannot reasonably be used as the rationale for a foreign policy."[37] The ensuing years, fraught as they were with oil crises and nonfuel mineral scares (such as that in cobalt during the latter part of 1978),[38] would not prove easy

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[35] Edward S. Mason, "American Security and Access to Raw Materials," *World Politics* 1 (January 1949): 151-53.

[36] Mancur Olson, Jr. "American Materials Policy and the 'Physiocratic Fallacy,'" *Orbis* 6 (Winter 1963): 683.

[37] Charles L. Schultze, "The Economic Content of National Security Policy," *Foreign Affairs* 51 (April 1973): 523.

[38] Barry M. Blechman, *National Security and Strategic Minerals: An Analysis of U.S. Dependence on Foreign Sources of Cobalt*, Westview Special Studies in National Security and

for the Schultze perspective. Rather than becoming less relevant to U.S. foreign policy, and to international politics, minerals seemed to attain renewed importance during the late 1970s and early 1980s, as if in confirmation of both the Leninist *and* the conservative resource-war versions of the link between economic competition and warfare.[39]

Further stimulating the debate over the role of minerals in U.S. national security has been the current situation in South Africa, which apart from its ethical implications presents some very real potential risks to U.S. (and Western) mineral supply in a range of strategic minerals, and especially in chromium, the platinum group metals, vanadium, and manganese. At least some Americans are convinced that, as David K. Shipler notes, "to maintain its technological prowess, its advanced military machine and its high standard of living, the United States requires dependable sources of raw materials throughout the world, and that economic interest seems to create a steadier foundation for policy than issues of morality or diplomacy."[40]

The United States is the one Western country that over time has fashioned the most ambitious policy responses to cope with potential disruptions of mineral supply, even though it is far from being the most import-dependent member of either NATO or the OECD. Indeed, it was in the War Department during the 1920s that the concept of "strategic minerals" was born, and it has been in Washington ever since that the most prominent mineral-policy levers of the post-World War II years have been deployed.[41] It would be incorrect to imagine that the United States has clearly chosen to follow a policy of autarchy over interdependence, for the post-World War II record supplies ample evidence that, as the Paley Commission report of the early

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Defense Policy (Boulder, Colo.: Westview Press, 1985).

[39] A Leninist perspective on raw-material competition can be found in Harry Magdoff, *The Age of Imperialism: The Economics of U.S. Foreign Policy* (New York: Monthly Review Press, 1969); and Michael Tanzer, *The Race for Resources: Continuing Struggles over Minerals and Fuels* (New York: Monthly Review Press, 1980). An interesting discussion of certain theoretical affinities between left- and right-wing analyses is Ole R. Holsti, "The Study of International Politics Makes Strange Bedfellows: Theories of the Radical Right and the Radical Left," *American Political Science Review* 66 (March 1974): 217-42.

[40] David K. Shipler, "U.S. Morals and South Africa's Metals," *New York Times*, 15 February 1987, p. E2.

[41] See Percy W. Bidwell, *Raw Materials: A Study of American Policy* (New York: Harper and Bros./Council on Foreign Relations, 1958).

1950s held, U.S. raw-materials interests and the U.S. national interest would both be served by a sourcing strategy that looked to the acquisition of supply on the basis of the least-cost producer, preferably one in a friendly stable country if not in the United States itself. Tempering this reliance on international trade to provide U.S. mineral supply, however, has been a pair of other policies, each developed in the post-war period, that constituted an implicit recognition that trade alone could not be expected to safeguard the resource-security interests of the nation: the Stockpiling Act of 1946, and the Defense Production Act (DPA) of 1950.

Both these policy measures were utilized during the Korean War, when concern for mineral supply loomed as an important consideration in U.S. resource trade. The Stockpiling Act was vigorously employed, both during and after the war; indeed, President Eisenhower was particularly concerned that raw-material constraints might seriously hamper U.S. military efforts, something he never tired of reminding his auditors. One historian has noted that "press conference questions on the point regularly elicited presidential lectures on the critical importance of foreign manganese, cobalt, tin, and tungsten, in terms both worthy of and gratifying to future New Left critics of American capitalism."[42]

Both the DPA and the Stockpiling Act (which was supplanted in 1979 by the Strategic and Critical Materials Stockpiling Revision Act) have had as their major objective the creation of sufficient supplies of essential materials during a war or national emergency. The U.S. strategic stockpile, which by the latter 1980s would come under the curious - but so far feckless - fire of the so-called "modernizers" in the National Security Council, who would modernize the holdings nearly out of existence, has an inventory of some $10 billion worth of materials (mostly minerals) in more than 80 categories; a further $5 billion worth of purchases has been deemed necessary if the targets for all the holdings are to be met, a situation that, given the current fiscal mood in Washington, has little prospect of being realized.[43] For all the

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[42] John Lewis Gladdis, *Strategies of Containment: A Critical Appraisal of Postwar American National Security Policy* (New York: Oxford University Press, 1982), p. 132.

[43] U.S. General Accounting Office, *National Defense Stockpile: Adequacy of National Security Council Study for Setting Stockpile Goals*, GAO/NSIAD-86-177BR (Washington, August 1986); U.S. Federal Emergency Management Agency, *Stockpile Report to the Congress, April-September 1985* (Washington: December, 1985); Alfred R. Greenwood, "The Reagan Administration Proposes Dramatic Changes to National Defense Stockpile Goals," 86-578 ENR (Washington: Library of Congress, Congressional Research Service, February 1986);

controversy surrounding it, the strategic stockpile is by far the most ambitious and expensive such project in the world - and this statement does not take into account the *other* major strategic reserve created in the United States, the Strategic Petroleum Reserve, which has more than a half-billion barrels of oil stored in underground caverns in Texas and Louisiana.[44]

Although not as well-publicized, or quite so heavily funded, as the National Defense Stockpile, the Defense Production Act did entail the expenditure of hundreds of millions of dollars during the Korean War years and after, chiefly for the purpose of expanding North American productive capacity of certain resources, particularly tungsten and nickel. Important beneficiaries of this U.S. governmental assistance during the 1950s were two Canadian nickel companies, Falconbridge and Sherritt Gordon.[45] The DPA continues to exist and is periodically extended by Congress, but it has been used very sparingly in the past two decades, and is not very likely to be invoked in any substantial way in the future, in light of the massive budget deficit in the United States.

As noted above, the United States is no longer as self-sufficient as it once was in natural resources, but by the same token it is still reasonably well-situated in minerals by comparison with most of the other members of the OECD and NATO.[46] What, then, accounts for the undeniable degree of anxiety with which, during most of the post-World War II years, U.S. security planners approached the question of mineral supply? The already-mentioned structural considerations that occasion within states a propensity to countenance self-help measures can, of course, explain some of the U.S. response to resources trade. But they cannot in themselves account for the degree of difference between the responses of the United States and most of the other developed Western countries, for whom the issue of mineral supply has seemingly been less compelling than it has for the United States. After all,

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Greenwood, "National Defense Stockpile Policy - The Congressional Debate," 86-863 ENR (Washington: Library of Congress, Congressional Research Service, August 1986).

[44] U.S. General Accounting Office, *Oil Reserve: Status of Strategic Petroleum Reserve Activities as of 31 March 1988*, GAO/RCED-88-175FS (Washington, June 1988).

[45] John E. Cameron, "Nickel," in *Natural Resources in U.S.-Canadian Relations*, vol. 2: *Patterns and Trends in Resource Supplies and Policies*, ed. Carl E. Beigie and Alfred O. Hero, Jr. (Boulder, Colo.: Westview Press, 1980), p. 69.

[46] See U.S. Congress, Office of Technology Assessment, *Strategic Materials: Technologies to Reduce U.S. Import Vulnerability* (Washington: May 1985), chap. 4: "Security of Supply,".

if the structural aspects of the international system are primarily the source of the quest for empire or autarchy (or both), why have so many states recently expressed an interest in neither?

We shall suggest that, in addition to, and in some measure flowing from, systemic injunctions, have been three other related considerations, which can help us understand U.S. attentiveness to mineral-security issues. First, the United States has only relatively recently been faced with the loss of a real, albeit never total, physical insulation from the kinds of travails that had been the lot of nearly all the other states in the international system. These travails could at times take the stark form of invasion, but in any event had predisposed states towards a certain level of discomfort in contemplating their own predicament in the anarchical society. The United States, for much of its history relatively immune from the normal condition of uncertainty and insecurity attached to the international "state of war," has only lately been forced to the serious contemplation of its own security, and at least part of U.S. foreign policy must be understood in terms of an attempt to regain the degree of protection from the vicissitudes of international politics that the former insulation once provided. The Strategic Defense Initiative is, no doubt, the most dramatic instance of the yearning to regain security paradise; but to a certain extent so too is mineral policy also affected by the desire to enhance U.S. security in a manner that most other states - and certainly those in Europe - would simply find to be beyond their wildest imaginings. In this respect, as in so many others, geography does have an impact on perceptions of threat and on foreign-policy formulations.[47]

A second reason for the exalted level of apprehension displayed by many in the U.S. minerals community relates to the recent spread and tightening of the bonds that connect the U.S. economy with the international trade and monetary system. For much of its history, the United States experienced a certain isolation from international economic forces that complemented and was facilitated by the country's relative insulation from global security patterns. Since the end of the Second World War, however, "interdependence" (whatever that contested term might mean) has become more of a factor in U.S. economic existence. With it has come an increased dependence on minerals and other items. This in turn, as we noted earlier, has triggered

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[47] The relationship between territorial insulation and foreign-policy role conceptions is explored in William Fox, "Geopolitics and International Relations," in *On Geopolitics: Classical and Nuclear*, ed. Ciro E. Zoppo and Charles Zorgbibe (Dordrecht: Martinus Nijhoff, 1985), pp. 15-44.

some concern about the erosion of the country's capacity to produce goods that might, in a war or national emergency, be unavailable and whose absence might present severe problems from the security perspective. For many other countries, long since accustomed to heightened dependence on foreign sources of supply, interdependence is really nothing new, nor is it particularly worrisome. For the United States, it is both.

A third and final consideration in accounting for U.S. mineral concerns has to be the attention that successive administrations in the postwar decades have given to security problems: in many ways, ever since it abandoned isolation and committed itself to the construction of a new international political, economic, and security order after 1945, the United States has developed an expansionary (some say globalist) foreign policy, one whose primary if not total focus has been on creating a congenial international environment for U.S. interests. Specialists in U.S. foreign policy may and do differ in assessing the fundamental "roots" of this expansionary drive. Some see it to be predicated primarily upon ideological considerations; others hold it to be necessitated by socio-economic considerations unique to capitalism; and still others find it mainly explicable in terms of the power capability of the United States (i.e. its superpower status). But nearly all would agree that expansion of commitments abroad has been a major, perhaps *the* major, characteristic of U.S. foreign policy since 1945.[48] The reason that foreign-policy expansionism gets related to minerals anxiety can largely be found in the degree to which the United States identifies its security (and other) interests with those of its allies; thus, whether invited to by the allies or not, the United States has at times taken upon itself (as with the Carter Doctrine and subsequent policy initiatives regarding Persian Gulf oil) the task of safeguarding not only its own, but the entire West's supply of certain minerals. It is hardly surprising, given the association it makes between its own fate and that of the allies, that the United States should reveal itself to be so troubled by developments in the

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[48] Explanations of U.S. foreign policy that focus on "ideological" motivations are Krasner, *Defending the National Interest;* and Albert K. Weinberg, *Manifest Destiny: A Study of Nationalist Expansionism in American History* (Chicago: Quadrangle Books, 1963). For the thesis that capitalist economic necessity propels U.S. foreign policy, see William Appleman Williams, *The Tragedy of American Diplomacy*, 2d ed. (New York: Dell, 1972). A reading of U.S. foreign policy that stresses the determining aspects of relative power is Robert W. Tucker, *The Radical Left and American Foreign Policy* (Baltimore: Johns Hopkins Press, 1971).

geopolitics of minerals, even if its more dependent allies do not seem to be so terribly concerned.[49]

Canada and U.S. Mineral Supply: The Peculiar Case of Uranium

It would be wrong to infer from the above discussion that the United States is obsessed with the problem of securing its mineral supply. There have been some analysts who have stressed minerals as a driving force in U.S. foreign policy, but such arguments tend to verge on the incredible.[50] There is no merit in reducing foreign policy to the single dimension of mineral supply, any more than there is merit in attempting to understand resource trade without taking into consideration security questions. As with any effort to grapple with complex reality, one must be careful with the sweeping generalization, or the powerful reduction. The point of the discussion so far has been not to advance the notion that security explains all or most of U.S. resource trade, but rather to sound the more modest note that we not be altogether dismissive of the security argument, which many persist in regarding as fallacious at best, insincere and pernicious at worst. It is obviously true that in a range of resources, trade distortions can be and are introduced for reasons so divorced from security that not even their supporters feel the need to invoke the "national security" argument (potash being a case in point); but it is also true that there are exceptional instances when security considerations do deserve to be taken seriously. In this regard, uranium is one of the preeminent examples of a commodity in which trade-distorting practices, largely though not entirely justified on the basis of security, have been fairly commonly resorted to.

It was more than a little odd to witness, a few years ago, the phenomenon of U.S. opposition to mineral imports from Canada, but this is just what we have seen in uranium (and some other commodities) since the mid-1980s. On the one hand, there are those "resource nationalists" in Canada who seem to be convinced that the United States is out to grab as many of our resources

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[49] David G. Haglund, "Oil as a Factor in U.S. Policy Toward the Middle East," in *Superpower Involvement in the Middle East: Dynamics of Foreign Policy*, ed. Paul Marantz and Blema S. Steinberg (Boulder, Colo.: Westview Press, 1985), pp. 175-98.

[50] See footnotes 34 and 39.

as it can. As one prominent nationalist, Mel Hurtig, sees it, Washington was chiefly if not exclusively interested in a bilateral free-trade arrangement with Canada because it wanted access to Canada's resources.[51] If the resource nationalists would find U.S. protectionism in respect of minerals to be odd, how much odder to U.S. mineral analysts, who have long argued that Canadian-sourced minerals are as reliable as domestically produced ones, must have been the spectacle of a Canadian mineral commodity being opposed on *security* grounds? For decades it used to be assumed that one of the reasons the mineral dependence of the United States was less troublesome than it might otherwise have been was because of the important role played by Canada as a supplier of essential minerals to the U.S. market. Although he was referring only to one mineral, John Dunn's observation of a generation ago could serve as a fair generalization for an entire category of commodities: "Nickel is obtained almost exclusively from Canada, which for most purposes may be treated as equivalent to a domestic source."[52]

To understand why uranium should have confuted both the expectations of the resource nationalists and those U.S. mineral experts who had grown used to counting upon the Canadian resource base, we must review some of the relevant features of U.S. uranium production, as well as of Canadian-U.S. trade in uranium. To start with, there can be no question that the U.S. mining industry has, in the 1980s, been in very deep trouble. Nor is there any doubt that imports have risen sharply in the past several years, ever since the United States lifted the last of the restrictions it had originally imposed in 1966 on the enrichment of foreign uranium for use by domestic utilities.[53]

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[51] In a speech to the Royal Military College, Kingston, 15 January 1987. Other examples of this tendency to overestimate the degree to which the United States either needs or covets Canadian resources are Philip Sykes, *Sellout: The Giveaway of Canada's Energy Resources* (Edmonton: Hurtig, 1973); and Philippe J. Brossard, *Sold American!* (Toronto: Peter Martin Associates, 1971).

[52] John M. Dunn, "American Dependence on Materials Imports: The World-Wide Resource Base," *Journal of Conflict Resolution* 4 (March 1960): 118. Also see Fillmore C.F. Earney, "The Geopolitics of Minerals," *Focus* 31 (May/June 1981): 4.

[53] U.S. utilities, and many other utilities worldwide, require for their light-water reactors "enriched" uranium to sustain a nuclear reaction. This means that the relative distribution of isotopes in natural uranium must be altered so that the proportion of "fissile" U-235 is increased from its naturally occurring 0.711 percent (by weight) to about 3 percent; by the same token, the share of U-238 is reduced to approximately 97 percent of the weight of the enriched product. U.S. Department of Energy, *World Uranium Supply and Demand: Impact*

During 1986, U.S. production of U_3O_8 (also known as uranium oxide, or "yellowcake") was below 6,750 short tons, a steep decline from 1980's record output of 21,852 tons.[54] U.S. mills by 1986 were operating at only 27 percent of their rated capacity of 42,650 tons of ore a day, and employment in the industry had shrunk to 2,120, from the 1981 level of 13,676.[55] Preliminary figures for 1987, released in late 1988, indicate further, though slight, declines in these indicators, suggesting perhaps the industry has finally "bottomed out."[56] Especially hard hit, though not the only affected state, has been New Mexico, which has seen its uranium industry virtually disappear. Eight years ago, that state's 38 mines and mills were employing 6,000 workers; today, some 300 work in the state's uranium industry, and New Mexico has ceased being the country's leading uranium-producing state.[57]

While domestic production facilities were closing down, import levels went up. After accounting for only a relatively minor share of U.S. consumption in the early 1980s, imports surged ahead after 1983, and now have slightly more than half of the U.S. market under current contracts. This share is projected to increase during the remainder of this decade; by 1990 imports should account for nearly two-thirds of domestic consumption.[58] Imports are not the sole, nor are they necessarily the chief, cause of the domestic uranium industry's current plight. Other factors worthy of mention in this regard include high production costs, a relatively low rate of growth in demand for

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of Federal Politics (Washington: Energy Information Administration, March 1983), pp. 119-20. (Hereafter cited as DOE, *World Uranium.*)

[54] One metric tonne of natural uranium (written as 1 tU) is equivalent to 1.3 short tons of uranium oxide (U_3O_8); put differently, 1 short ton of U_3O_8 equals 0.769 tU.

[55] U.S. Department of Energy, *Uranium Industry Annual 1986* (Washington: Energy Information Administration, October, 1987), pp. viii, 43. (Hereafter cited as DOE, *Uranium Industry Annual 1986.)*

[56] DOE, *1987 Viability Assessment*, p. x.

[57] DOE, *Uranium Industry Annual*, pp. 40-47.

[58] DOE, *1987 Viability Assessment*, p. 64.

nuclear reactors, and excessive domestic inventory levels, estimated to stand at four times the utilities' annual requirement for uranium.[59]

Inasmuch as Canada's share of the U.S. import market is large and growing, now constituting 82 percent of total imports,[60] it is not surprising that attention - and not just on the part of protectionists - has during the past few years turned to the policies and practices of Canadian governments and uranium producers. Canada has been charged with a host of sins by advocates of protectionism, as well as with a lesser aggregation of venialities by free-traders. How else, the protectionists have argued, could Canada have been so successful in penetrating the U.S. market if not by resorting to unfair trading practices?[61] In the words of one U.S. union official (and an "international" union at that), "almost all new contracts for uranium [in the United States] are for uranium produced abroad. The reason is simple: foreign governments heavily support and subsidize their own uranium industries. They sell their surpluses here at prices below those in their home markets and they pour hundreds of millions of government cash into their own uranium development projects. Our uranium industry cannot survive in the face of that kind of 'competition'."[62]

There are several ironies of recent Canadian-U.S. uranium trade, and one of them is that there is indeed a "simple" reason underlying Canada's penetration of the U.S. market, only the reason has little to do with this union official's unfair-trading allegations. Let us consider the most frequently mentioned instances of improper conduct. It is charged that Canada is subsidizing its uranium production, *inter alia*, by government involvement in

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[59] U.S. Department of Energy, *Domestic Uranium Mining and Milling Industry: 1986 Viability Assessment* (Washington: Energy Information Administration, November 1987), pp. x, 12. (Hereafter cited as DOE, *1986 Viability Assessment*.)

[60] DOE, *1987 Viability Assessment*, p. 12.

[61] For a list of particulars, see the Memorandum Submitted by the Uranium Producers of America to the Department of Commerce Investigation of Uranium Imports, 29 March 1989. (Hereafter cited as UPA Memorandum.)

[62] Testimony of Nolan W. Hancock, Oil, Chemical and Atomic Workers' International Union, U.S. House of Representatives, Committee on Interior and Insular Affairs, Subcommittee on Energy and the Environment, "Oversight Hearing on Uranium Import Restrictions," 20 June 1985 (committee mimeo). (Hereafter cited as "House Oversight Hearing.")

the industry through Crown corporations.[63] Is there any merit to the charge? To answer this requires that we take a brief look at what during the mid-1980s became a catchphrase of sorts in Washington, the issue of "foreign industrial targeting." Though not coterminous with subsidization, targeting is a related concept; it might be considered to be the genus of which subsidies constitute a species. As a U.S. Department of Commerce study put it a few years ago, somewhat inelegantly: "The crucial distinction...is that targeting is a government strategy, implemented through a selection of policies, while subsidies derive from certain government policies." Targeting may, but need not, result in subsidies, at least in theory.[64] In practice, however, the conceptual boundary becomes blurred. Not only is it almost impossible to decide what constitutes a subsidy, but it is patently impossible to determine whether foreign subsidization is detrimental to U.S. interests, and, if so, to what degree.

Further complicating matters is the fact that, as another branch of the U.S. government has noted, "all nations, including the United States, provide some type of assistance to selected industries. In many cases, the assistance is a legitimate response by the government to national needs."[65] In the case of uranium, it is true that both the U.S. and Canadian industries have in the past received various forms of subsidies from their respective governments, but it is difficult to see what effect the existence of past subsidization has on current bilateral trade in uranium. And even if one could establish that past subsidization policies do have, even after they have been abandoned, "multiplier effects" that live on into the present (a not unreasonable proposition), where would the finger of blame point? It is another irony of North American uranium production and trade that not only has Canada's uranium industry

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[63] See Appendix G, "Draft Background Paper on Government Support for Canadian Uranium Industry Prepared for UPA," UPA Memorandum.

[64] U.S. Department of Commerce, International Trade Administration, "Study of Foreign Government Targeting Practices and the Remedies Available under the Countervailing Duty and Antidumping Laws" (Washington, July 1985), pp. 78-79.

[65] U.S. General Accounting Office, *Foreign Industrial Targeting - U.S. Trade Law Remedies* (Washington, May 1985), p. 1.

been subsidized by various Canadian governments, it has been heavily subsidized by Washington![66]

It is often charged that Canada continues to subsidize its uranium industry, primarily because of the extent of government equity participation in the industry, especially at the provincial level.[67] With the SMDC-Eldorado merger to form Cameco, and the privatization impetus well-launched, this charge becomes increasingly less relevant. But even were there *no* privatization of the Canadian uranium industry, the simple fact of government ownership by no means would support the contention of subsidization, at least not according to U.S. trade legislation.

Section 771(5) of the Tariff Act of 1930 (as amended) distinguishes two classes of subsidies. Fairly straightforward are the *export subsidies* (e.g. government provision of export credits at rates lower than the cost of the funds) that are enumerated in the GATT Subsidies Code. Less clear-cut are *domestic subsidies*, which are forms of government assistance accorded to specific industries or enterprises, or groups of either. According to the above-mentioned Department of Commerce study, "government ownership *per se* does not confer a subsidy. The Tariff Act specifies that government provision of capital constitutes a domestic subsidy only when it is 'on terms inconsistent with commercial considerations'."[68] It has yet to be shown that Canadian, especially Saskatchewan, government provision of capital constitutes a domestic subsidy; it has never been an easy matter to show this, and it becomes less easy with every passing year.

Though this brief survey has not explored all possible means of subsidization, it is hard at this juncture to establish a credible link between subsidies and the current plight of U.S. uranium producers. In any event, the latter have not shown themselves eager to petition for import relief in the form of

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[66] Hugh C. McIntyre, *Uranium, Nuclear Power, and Canada-U.S. Energy Relations* (Montreal and Washington: Canadian-American Committee, 1978), pp. 13-15. Also see, for an analysis of the impact of U.S. governmental expenditures on the development of the Canadian uranium industry, Robert Bothwell, *Eldorado: Canada's National Uranium Company* (Toronto: University of Toronto Press, 1984), pp. 339ff.

[67] For a good discussion of Saskatchewan governmental involvement in uranium production, see David L. Anderson, "Innovation in Public Rent Capture: The Saskatchewan Uranium Industry," in *Resource Rents and Public Policy in Western Canada*, ed. Thomas Gunton and John Richards (Halifax: Institute for Research on Public Policy, 1987), pp. 147-80.

[68] "Study of Foreign Government Targeting," p. 22.

countervailing duties. Such duties are sometimes cited as perhaps the most threatening form of "contingent protection" confronting general Canadian export interests in the U.S. market.[69] There is really not much likelihood that they will pose a major obstacle to Canadian uranium exports, for a variety of reasons. Probably the most important of these is that even if the two necessary conditions for the imposition of a countervailing duty on Canadian uranium were satisfied - that the International Trade Commission (ITC) found the U.S. uranium industry either to be "materially injured" or to be threatened with such injury by reason of imports, *and* that the Department of Commerce determined a subsidy to exist, and set the margin of such subsidization - the amount of protection such a duty would accord U.S. producers would likely be nugatory, given the tremendous differentials in cost of production in Saskatchewan compared with those in New Mexico and the other uranium-producing states.

What has been said of the subsidization allegations applies in a sense to another charge of unfair trading: that Canada is "dumping" its uranium in the U.S. market. Superficially, the dumping allegation appears plausible. It is no secret that Canadian uranium is selling in the United States at prices lower - often far lower - than the price Canadian uranium sells for at home under long-term contracts. What is not so well appreciated in Washington, however, is that it is not the high-cost Canadian producers who are doing most of the exporting to the United States. Of the two Ontario (i.e. "high-cost") producers, Rio Algom and Denison, only the former sells to U.S. utilities, to Duke Power on a long-term, high-priced contract very much like its similar contracts with Ontario Hydro, signed in the mid-1970s. For the most part, these two producers rely on other foreign markets and on Ontario Hydro, the consumer of the vast majority of uranium used in Canada. Both producers have long-term contracts, on a cost-plus basis, with Ontario Hydro - contracts that have occasioned some grumbling in the province over the past few years.[70] Noted one analyst nearly a decade ago, in something of an understatement: "The conclusion to be drawn is that Ontario Hydro's costs for uranium from its two long-term Elliot Lake contracts may be somewhat higher for the next few years than for material which might have been purchased on the currently

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[69] Lipsey and Smith, *Taking the Initiative*.

[70] For a critical assessment of the level of subsidization accorded Denison Mines by a succession of governments (including that of the U.S.), see Paul McKay, "The Less-than-Holy Roman Empire," *Globe and Mail*, 9 April 1988, pp. D1, D8.

depressed spot market."[71] If one used current "spot" prices as a guide, it could be argued that Ontario Hydro is paying its long-term Ontario suppliers a hefty premium, in some instances of more than 100 percent. Not all the uranium consumed in Ontario, however, *is* under long-term contracts; today, for example, some 30 percent of Ontario Hydro's uranium comes from Saskatchewan, under recent contracts at lower prices. Moreover, there are U.S. utilities that also purchase, under long-term contracts, "high-cost" uranium from domestic miners.[72]

A marked aspect, moreover, of the uranium market is that a significant amount of the product is sold on a "spot" basis.[73] More than three-quarters of new contracts signed by Canadian producers in 1987 were spot contracts. In all, Canadian spot-market deliveries in 1987 accounted for a third of all export deliveries. This is a profound change from earlier in this decade, and it means that no longer does contract-pricing so totally dominate uranium trading.[74] Nevertheless, the terms and prices by which many contracts have been governed can and do vary, at times enormously. Notes the U.S. Department of Energy: "A striking feature is the range of prices in a given year; the high end of the range is typically two to three times the low end."[75] All of this is to remark that, for uranium more than for most other commodities, the marketing regime is complex, perhaps even "messy." What does this imply, then, for the likelihood of a future antidumping petition being filed against Canadian producers?

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[71] J.C. Runnalls, *Ontario's Uranium Mining Industry: Past, Present, and Future*, Ontario Mineral Policy Background Paper, no. 13 (Toronto: Ontario Ministry of Natural Resources, 1981), p. 70.

[72] Interview, Ottawa, 8 June 1989.

[73] The term "spot market" is a misnomer; what people actually refer to when they use the term is the Nuclear Exchange Corporation's (Nuexco) "exchange value," i.e. this leading broker's estimate of the price at which transactions for *immediate* delivery could have been made as of the last day of the month. DOE, *World Uranium*, p. 106.

[74] Interview, Ottawa, 8 June 1989. For the pricing regime of the early 1980s, see OECD Nuclear Energy Agency, International Atomic Energy Agency, *Uranium: Resources, Production and Demand* (Paris Organization for Economic Cooperation and Development, December 1983), p. 33.

[75] DOE, *World Uranium*, p. 5. Indeed, in 1986 the price of a pound of domestic U_3O_8 delivered to U.S. utilities ranged from $10 to $100! DOE, *Uranium Industry Annual 1986*, p. vii.

This dramatic variance in pricing, coupled with the fact that the Canadian companies who are charging "high" prices to their Canadian consumers are not, for the most part, the companies that are exporting to the United States, minimizes the likelihood that antidumping duties would be imposed on Canada's uranium exports. The Saskatchewan producers, who would be most affected by an antidumping duty, sell in the foreign market, at prices that are lower, to be sure, than those that Ontario producers are fortunate enough to command from Canadian consumers - but also at prices that are lower than those that U.S. producers can offer. This does pose a problem for U.S. uranium mining companies, but it is important, in attempting to understand the U.S. inability to compete, that one not introduce extraneous issues. The subsidization and dumping allegations notwithstanding, it appears that even the domestic companies and their lobbying association (the Uranium Producers of America) do not put much credence in their own utterances. How else is one to account for their failure, at a time when numerous other U.S. industries have actively been litigating for protection, to take their complaints before the International Trade Commission and the Department of Commerce? Despite the upsurge in the number of countervail and antidumping cases coming through the ITC and ITA, the domestic uranium industry has yet to avail itself of what has been termed "probably the richest menu [of import-relief measures] available to any producers any place in the world."[76]

Have, then, the actions of the domestic uranium interests spoken more loudly than their words? Can one conclude that, despite the sensational charges of unfair trading, Canadian exporters really have little to fear from the mood, rampant in Congress, that the United States is being "had" by its trading partners? For the most part, the answer is Yes: Canadian uranium is relatively safe from protectionist assaults predicated on the basis of unfair trading; and this would be so even in the event the FTA were scuttled. The "real" threat - and this is today scarcely the threat it was two years ago - facing Canadian interests is to be found instead in a national-security context, which we discuss below. But before leaving altogether our discussion of the unfair-trading allegations, it is well to note that until recently there has been at least one major trade-distorting practice followed by Canada that did lend some credibility to the unfair-trading allegations.

This was the "further processing" issue, namely the requirement that as a matter of course Canadian uranium be exported in the most advanced stage

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[76] Charles H. Blum, "The Effect of Government Policies on Minerals Trade-Relief Measures," *Materials and Society* 8, 3 (1984): 503.

into which it could reasonably be fabricated in Canada. This does not mean enriching uranium in Canada, a production process that holds little if any prospect of ever being economical in this country. Instead, it is in the stage of the "front end" of the nuclear fuel cycle known as *conversion* that Canada has recently and rapidly built up productive capacity: today, Eldorado Resources' refining and conversion facilities in Ontario, at Blind River and Port Hope, have the capacity to upgrade all the uranium produced in Canada's mines.[77] From the point of view of international trade "etiquette" there is nothing wrong with a country having productive capacity in any particular phase of the nuclear fuel cycle; what the United States has objected to was that Canada, subject to some exemptions,[78] forced its uranium mills to ship their U_3O_8 to Ontario's conversion facility, thus potentially limiting the amount of business available to the two U.S. conversion operations run by Allied Chemical and, until it sold its facility recently, Kerr-McGee.[79]

Canada's policy on further processing of minerals is a longstanding one that antedates the country's uranium industry; it can be traced back to the early years of this century, a time when Inco was repeatedly confronted by demands from both the federal and provincial (Ontario) levels of government to refine its nickel ore in Canada.[80] It is yet another irony of bilateral uranium trade that the one policy that has most lent itself to characterization as a protectionist measure was introduced by a politician who subsequently became a champion of the Canadian-American Free Trade Agreement. In a September 1974 policy statement, Energy Minister Donald Macdonald announced that unless specific exemptions were granted, all Canadian U_3O_8

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[77] R.T. Whillans, "Uranium," *in Canadian Minerals Yearbook 1985: Review and Outlook* (Ottawa: Energy, Mines and Resources Canada, 1986), p. 64.7. The new UF_6 facility at Port Hope, which attained commercial production levels in April 1985, has an annual capacity of 9,000 tU.

[78] Thomas L. Neff, *The International Uranium Market* (Cambridge, Mass.: Ballinger, 1984), p. 153.

[79] Though privately the Kerr-McGee interests were expressing great concern about the future supply of U_3O_8 to their Oklahoma conversion facility, publicly the corporation was claiming to have "a multiyear backlog of conversion work to satisfy more than 30 contracts with customers worldwide." *1984 Kerr-McGee Corporation Annual Report*, p. 26.

[80] O.W. Main, *The Canadian Nickel Industry: A Study in Market Control and Public Policy* (Toronto: University of Toronto Press, 1955), p. 5.

would have to be upgraded to its most advanced form (i.e. UF_6) prior to export; this policy was reaffirmed in September 1983, only to be radically modified four years later. The upgrading controversy was resolved, though not to the complete satisfaction of the USTR, during the negotiation of the FTA. In exchange for the United States agreeing not to proceed in the GATT against Canada's policy, and in anticipation of the positive effect a resolution of the UF_6 issue could have on meeting the protectionist challenge in Washington, Ottawa agreed to suspend the further-processing provision in respect of exports to the U.S. market.[81] For destinations other than the United States, there continues to be the further-processing requirement, which the office of the USTR argues results in some potential loss for U.S. converters in offshore markets. Japan, which is contemplating developing an enrichment capability, is one such potential market.[82]

Notwithstanding the upgrading and other wrangles we have cited, there is a truly "simple" explanation for Canadian dominance of the U.S. import market: no one can match the ore grades of the Saskatchewan mines that have been brought into production in recent years. Canadian uranium has a cost advantage that ultimately has little to do with policies or politics, and nearly everything to do with geology. Few producers in the world can make money at the current spot price of about $10 per pound for U_3O_8. For the most part, U.S. mines require a price three times as high just to break even; and though contract prices are generally higher than the spot-market price, the salient fact is that utilities in the United States are finding that better terms are available from Canadian than from U.S. producers.[83]

But Saskatchewan producers can make money even at low spot-market prices.[84] Easily the single most important factor accounting for their low

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[81] This suspension is contained in Annex 902.5 of the FTA. See Government of Canada, Department of External Affairs, *The Canada-U.S. Free Trade Agreement* (Ottawa, 1987), p. 149.

[82] Interview, Washington, 12 June 1989.

[83] For instance, in 1986 the average price of domestic U_3O_8 sold to American utilities was $30.01 a pound; for foreign U_3O_8 these same utilities paid an average of $20.07 a pound. DOE, *Uranium Industry Annual 1986*, p. vii.

[84] Production costs of Saskatchewan mines are discussed in David L. Anderson and Donald W. Barnett, "Taxation of Uranium Mining Ventures in Saskatchewan: A Policy Assessment," *Resources Policy* 9 (September 1983): 200-1.

production costs is ore grade. George White, a senior executive of Nuexco, has correctly indicated that "the leverage obtained from high-grade ore is tremendous. Grade is the name of the game."[85] In the United States during the 1970s, ores were being mined that had an average uranium content of 0.2 percent; by the 1980s, ore grades had declined to 0.1 percent.[86] In Saskatchewan, on the other hand, ore grades of 2 to 3 percent are being exploited at Key Lake, the world's largest production centre. Waiting in the wings, and still a few years away from producing, is the awesome Cigar Lake deposit, "the world's largest high-grade uranium deposit," with an estimated 110,000 tU in ore averaging 12 percent [!] uranium.[87]

The Debate over "Viability" and National Security

If Canada has not been trading unfairly, then, on what basis have the country's uranium exports been subjected, over the past few years (and, indeed, even before then) to protectionist assaults? The basis was and perhaps still is a national-security argument that finds legislative support in a section of the Atomic Energy Act that ostensibly *required* the Secretary of Energy to impose import restrictions should he deem the U.S. uranium industry to be no longer "viable." It was this assumed requirement that, as we noted earlier, was at the centre of the two-year proceedings in court. This was not the only statutory mechanism upon which the protectionist advocates had been pinning their hopes, but it had been, prior to the Supreme Court's decision and the FTA, their most useful such mechanism to date. It has been likened to getting into a street brawl armed with a gun instead of a knife.[88] While this may be an

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[85] Quoted in William E. Blundell, "Nuclear Reaction: U.S. Uranium Mines, Thriving 5 Years Ago, Are Nearing Extinction," *Wall Street Journal*, 12 June 1985, p. 16.

[86] U.S. Department of Energy, *United States Uranium Mining and Milling Industry: A Comprehensive Review* (Washington: Energy Information Administration, May 1984), p. 47. (Hereafter cited DOE, *Comprehensive Review*.)

[87] Runnalls, *Ontario's Uranium Mining Industry*, p. 38; Energy, Mines and Resources Canada, *The Canadian Mineral Industry Monthly Report: May 1985*, p. 44; "Canada's Nuclear Motherlode," *New York Times*, 3 March 1985, p. F4.

[88] Interview, Washington, 20 June 1985.

apt comparison, it bears noting that the statutory "gun" in question does not pack the power it had two decades ago; against Canada, because of the FTA, it has no power at all any more. However, to understand the significance of the recent threat to Canadian uranium exports, it is necessary to review some salient aspects of Canadian-U.S. trade in which national-security procedures were invoked to secure protection from imports.

We noted above that Canadian uranium producers once battened on subsidies from a United States government desirous of developing uranium productive capacity, both in the United States itself and in secure foreign countries. Prior to the development of a commercial market for nuclear energy, the U.S. - and, to a lesser extent, British - nuclear weapons programs constituted virtually the sole market for uranium producers in the Western world.[89] At the start of the 1960s, the U.S. Atomic Energy Commission was in the process of phasing out its uranium purchase contracts, a move that hit U.S. producers hard, and nearly devastated Canadian ones. Even worse, the Commission announced in 1964 that, as of 1966, it would no longer enrich foreign U_3O_8 for use in commercial markets in the United States, effectively closing to foreign producers some 70 percent of the world market for non-military consumption of uranium.[90]

This total embargo was in place for a decade, and was completely phased out only in 1983. It found its statutory authority - the "gun" in our discussion above - in a 1964 amendment to the Atomic Energy Act of 1954: Section 161(V). It was this that the protectionist forces sought, through the U.S. courts, to deploy in such a manner as to force the hand of an administration they considered to be rife with free-trade ideologues. Seemingly, Section 161(V) mandated that the domestic uranium industry be kept "viable," if need be by the imposition of an enrichment embargo on foreign U_3O_8.[91]

Among those who have followed the U.S. industry's most recent campaign for import relief, nothing has attracted as much attention in the past few years

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[89] Ron Finch, *Exporting Danger: A History of the Canadian Nuclear Energy Export Programme* (Montreal: Black Rose Books, 1986), chap. 1; Robert Bothwell, *Nucleus: The History of Atomic Energy of Canada Limited* (Toronto: University of Toronto Press, 1988), chap. 1.

[90] Ted Greenwood and Alvin Streeter, Jr., "Uranium," in *Natural Resources in U.S.-Canadian Relations*, vol. 2: *Patterns and Trends in Resource Supplies and Policies*, ed. Carl E. Beigie and Alfred O. Hero, Jr. (Boulder, Colo.: Westview, 1980), pp. 324-26.

[91] DOE, *World Uranium*, pp. 3-4.

as has the annual "viability assessment" of the Secretary of Energy. According to another section of the Atomic Energy Act of 1954, Section 170(B), as amended by Section 23(B) of the Nuclear Regulatory Commission Authorization Act of January 1983, the Secretary must make an annual viability assessment of the U.S. uranium industry for each of the ten years from 1983 through 1992.[92] The first such assessment, that for 1983, was issued on the last day of 1984, and was greeted with astonishment and outrage by the domestic producers and their supporters, who could not understand how the Secretary could find the struggling U.S. industry to be viable.

Part of the explanation for that first viability finding, which even DOE officials conceded to have been a "judgement call," had to be found in the tendency of the respective camps to adopt profoundly differing understandings of the word viability. Somewhat in the fashion of Humpty Dumpty, the protagonists in the protectionism/free-trade debate tended to mean by viability simply what they choose it to mean, "neither more nor less." For instance, the Uranium Producers of America originally suggested that the true test of viability should incorporate a "vital-signs" approach that focused on such indices as production and employment levels, capital expenditures, and exploration drilling. Measured against these indices, it was the UPA position that "the U.S. uranium industry is not viable by any logical definition." [93] This assertion notwithstanding, there is a dictionary usage of viability that does concede some logic to the manner in which the Department of Energy chose in 1984 to construe viability, namely as having the capability to grow.

To be sure, the then-Secretary of Energy, Donald P. Hodel, was less than clear in his 1983 assessment as to how to interpret the vital signs. What to the protectionists sounded like a death rattle has appeared, to the DOE analysts at least, as evidence that resurrection was not only possible, but perhaps at hand. "No specific conclusion," stated these analysts, in a 1983 study, "is reached in this report with respect to a minimum domestic production level necessary for a viable uranium mining and milling industry...." However, the DOE writers did assume that the domestic industry would be rebounding from its contemporary depressed state, and they also argued that,

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[92] U.S. Department of Energy, *Domestic Uranium Mining and Milling Industry: 1983 Viability Assessment* (Washington: Energy Information Administration, December 1984), p. iii. (Hereafter cited as DOE, *1983 Viability Assessment.*)

[93] Testimony of Robert Luke, Uranium Producers of America, "House Oversight Hearings."

from a national-security perspective, viability was indicated by the ability of U.S. utilities to avail themselves of Canadian productive capacity in the event of a supply disruption between 1983 and the end of the century.[94] To the protectionists, it was a strange kind of resurrection indeed that, to succeed, had to depend on the very devil that had put the U.S. industry at death's door in the first place!

There have been four further viability assessments since the 1983 one. Significantly, the 1984 assessment reversed the viability finding for 1983;[95] and the following three assessments also supported the conclusion that - on the basis of the major criteria of resource capability, supply-response capability, financial capability, and import-commitment dependence - the U.S. uranium industry had to be considered non-viable.[96] However, there has yet to be any reimposition of enrichment embargoes, nor have there been to date any other barriers erected to keep Canadian and other non-South African foreign uranium out of the U.S. market, notwithstanding the existence of legislation seemingly mandating import restrictions.[97]

As the lengthy struggle in the courts indicated, there was no agreement among lawyers (or judges, for that matter!) whether a non-viability finding should have necessarily resulted in an embargo on enrichment services. But even were there no FTA, and had the Supreme Court ruled differently, it seems obvious that an embargo today would no longer carry the threat to foreign producers that it did in 1966, when the United States had a virtual monopoly on world enrichment services. There is now an oversupply of enrichment capacity available not only from the facilities operated by the U.S. Department of Energy, but also from those run by two western European enrichers (Urenco and Eurodif) and one Soviet enricher (Techsnabexport).[98]

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[94] DOE, *Comprehensive Review*, p. xviii.

[95] U.S. Department of Energy, *Domestic Uranium Mining and Milling Industry: 1984 Viability Assessment* (Washington: Energy Information Administration, September 1985).

[96] U.S. Department of Energy, *Domestic Uranium Mining and Milling Industry: 1985 Viability Assessment* (Washington: Energy Information Administration, November 1986); DOE, *1986 Viability Assessment*; DOE, *1987 Viability Assessment*.

[97] South African uranium reportedly did not enter the U.S. market in 1987, even though some imports are permissible under current law. DOE, *1987 Viability Assessment*, p. 12.

[98] Neff, *International Uranium Market*, p. 19.

The U.S. share of global capacity, in the range of 30 to 40 percent, has eroded dramatically during the past decade, which necessarily renders less damaging any embargo on enrichment services.

Thus, to accord real protection, any restrictionist measures imposed under Section 161(V) would have had to be supplemented by other arrangements. Are there provisions for such arrangements on the U.S. statutes? Yes; there are at least two trade laws that can be invoked, with or without Section 161(V), to stem the tide of uranium imports, both linked to the above-mentioned Section 23(B) of the Nuclear Regulatory Commission Authorization Act of January 1983. This act not only mandated an annual viability assessment for ten years; it also enjoined the administration to monitor uranium-import levels, and to take action in the event imports appeared to be threatening the domestic industry. It has two relevant features: one provision calls on the U.S. Trade Representative to ask the ITC to initiate an investigation under Section 201 of the Trade Act of 1974 in the event the Secretary of Energy finds that imports are either a "substantial cause of serious injury" or a "threat thereof"; another provision stipulates that should current import contracts or options on foreign uranium constitute an amount greater than 37.5 percent of domestic requirements for two years in a row, *or* should the Secretary of Energy believe that import-contract levels might impair national security, then the latter must ask the Secretary of Commerce to carry out an investigation of the national-security impact of uranium imports under Section 232 of the Trade Expansion Act of 1962.[99]

As we noted in the previous chapter on copper, Section 201 of the Trade Act of 1974, sometimes called the "escape clause," empowers the President to impose restrictions on imports if the ITC advises that he should. It will be recalled that, unlike antidumping or countervailing duty investigations, Section 201 determinations do not hinge on whether unfair-trading practices are responsible for increased imports; it suffices that imports alone be found to constitute a "substantial cause of serious injury, or the threat thereof." Should the ITC so find, it may recommend, and the President may impose, import-relief measures, usually involving either tariffs or quotas, or both. The import relief is intended to be temporary (in no case to exceed eight years), so as to

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[99] DOE, *1983 Viability Assessment*, p. 3.

encourage the domestic industry's "adjustment" to international competition.[100]

To date, the domestic uranium industry has not chosen to file a petition for import relief under Section 201, mainly because of the high costs (estimated to be between $250,000 and $500,000) associated with building one's legal case, coupled with the relatively low probability that the effort would result in import relief; for only 20 percent or so of ITC investigations culminate in import-relief measures *other* than trade-adjustment assistance. The Uranium Producers of America had been hoping that a "non-viability" finding would automatically trigger a USTR-initiated 201 investigation, which would have meant that the government and not the industry would have borne the brunt of the legal and other costs associated with the process. There is, apparently, no requirement that a non-viability determination be accompanied by a USTR-triggered Section 201 case, despite some ambiguous wording in the statute that suggests the opposite.[101]

Section 232 of the Trade Expansion Act of 1962, as amended, is a seldom-used device that allows the President to impose restrictions on imports that are held to impair the national security.[102] This has been employed perhaps once a year during most of the past decade, save for the past two years when it was invoked three times, to cause investigations to be launched in anti-friction bearings, petroleum, and plastic injection-molding machines. As we noted earlier in this chapter, Section 232 was also invoked in the machine-tools industry; unlike the other three investigations, that one did result in import relief for U.S. industry.[103] Should the Secretary of Commerce judge

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[100] Michael H. Stein and Nicole Sideris, "Relief from Import Competition under the 'Escape Clause': Section 201 of the Trade Act of 1974," Book 5, *Law and Practice of United States Regulation of International Trade*, ed. Charles R. Johnston, Jr. (New York: Oceana Publications, 1987).

[101] Interview, Washington, 27 June 1985. This point is expanded upon in a letter from former USTR Clayton Yeutter to then-Secretary of Energy, John Herrington, 26 December 1985.

[102] See U.S. Department of Commerce, Office of Industrial Resource Administration, "The Effect of Imports on the National Security" (Washington, July 1984).

[103] U.S. Department of Commerce *News*, "Statement by Secretary of Commerce C. William Verity on Anti-Friction Bearings," 28 November 1988; ibid., "Statement by Secretary of Commerce Robert Mosbacher on Section 232 National Security Import Investigation of Plastic Molding Machines," 17 February 1989; White House, Office of the Press Secretary, Statement by the President on Petroleum Imports, 3 January 1989.

that imports are a danger to security, he must so advise the President who may in turn, at his discretion, take measures to "adjust" import levels.[104] This national-security provision has recently been invoked for uranium, with the Department of Commerce now in the midst of an investigation that is to result in a report being prepared for the President by 26 September 1989. Following his receipt of this study, President Bush will have 90 days to respond.[105] In light of this ongoing investigation, it is worthwhile spending some time exploring whether uranium imports might conceivably be linked to national security, and if so, why.

National-Security Implications of Uranium Imports

As we have indicated above, Canadian uranium exports to the United States seem unlikely to be restricted on the basis of unfair trading. If there *is* a danger of their being interfered with (and we reiterate that the danger no longer seems as clear as it did prior to the FTA), it inheres in the area of national security. It is yet another irony of bilateral uranium trade that there should be some basis, in law and possibly even in logic, for a national-security concern about imports of Canadian uranium. For several decades, Canadian source of supply has been regarded, in most minerals, as being practically tantamount to U.S. domestic supply, insofar as questions of emergency planning and industrial preparedness are concerned.[106] For example, the inventory objectives of the U.S. strategic stockpile for a broad range of minerals are determined through an evaluation procedure that makes provisions not only for U.S. domestic production prospects, but also for those in "strategically accessible" countries, and in this category no country seems as strategically accessible to the United States than does Canada.[107]

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[104] U.S. Congress, House Committee on Ways and Means, Subcommittee on Trade, *Overview of Current Provisions of U.S. Trade Law*, 96th Cong., 2d sess. (Washington: U.S. Government Printing Office, 1984), p. 89.

[105] Interview, Washington, 14 June 1989.

[106] David G. Haglund, "Canadian Strategic Minerals and United States Military Potential," *Journal of Canadian Studies* 19 (Autumn 1984): 5-31.

[107] Interview, Washington, 18 June 1985.

What, then, accounts for the disquiet expressed by the domestic producers and their Congressional suppliers over the reliability of Canada as a uranium supplier? The "disquiet" stems, in a fundamental sense, from their desire for import relief; that is obvious. Still, there is a logic to the disquiet, one that has a double root, which in turn is related to the dual "strategic" nature of uranium, namely that it is both an important energy mineral, and an indispensable military one. Admittedly, uranium does not constitute a major share of total energy consumed in the Western industrialized countries: at the start of this decade, OECD members were getting less than 4 percent of their total energy from nuclear power-plants (as against nearly half their energy from oil) and, while the proportional OECD consumption of uranium is expected to double by 2000, it will continue to lag far behind the fossil fuels.[108] Nevertheless, there is a case to be made for the economic importance of nuclear fuel, based on its role as a significant source of electricity generation in several parts of the world. The Province of Ontario, for example, now generates more than a third of its electricity in nuclear power plants, and by 2000 nuclear power is projected to account for more than 60 percent of the province's electricity. Neither the overall Canadian nor the U.S. electricity-generating patterns reflect such a heavy reliance on nuclear power; at present each country counts on nuclear power for slightly less than 13 percent of its electricity output.[109]

Still, the role of uranium in U.S. electricity generation should not be minimized. At the moment, uranium is second only to coal as a domestic fuel for the generation of electricity, and by 2000 is expected to account for nearly 20 percent of U.S. electricity.[110] It is in this context, much more so than in that of weapons building, that one often hears the domestic protectionist forces expressing their misgivings about uranium imports on the basis of *security* considerations. The argument is advanced that, should U.S. uranium producers be put out of business or reduced to insignificance, there would be

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[108] Hanns W. Maull, *Raw Materials, Energy and Western Security* (London: Macmillan/International Institute of Strategic Studies, 1984), pp. 50-51.

[109] Robert T. Whillans, "Uranium," in *Canadian Minerals Yearbook 1983-1984: Review and Outlook* (Ottawa: Energy, Mines and Resources Canada, 1985), pp. 63.8 - 63.9, 63.16.

[110] U.S. Department of Energy, *Commercial Nuclear Power 1987: Prospects for the United States and the World* (Washington: Energy Information Administration, July 1987), p. 10.

nothing to check future "price gouging" on the part of supplier countries such as Canada, and this would be extremely damaging to U.S. economic security.

In this regard, one often hears references made to Canada's participation in the uranium cartel of the early 1970s, with the clear implication being that it cannot be counted on to refrain from exploiting its "leverage" over helpless U.S. consumers.[111] Just as a decade or so ago in Canada the creation of a national oil company was urged to enable Ottawa to get a "window" on the oil industry and presumably exert some control over upward price movements, so today in the U.S. uranium producers are urging that domestic (though not state-owned) mining be kept viable to prevent uranium prices from rising to extortionary levels.[112] This argument is a very weak one, for it rests on the fallacious assumption that the cartel was instrumental in the uranium price spike of the 1970s.

In addition to economic-security arguments made in support of domestic production, there is a military-security argument being made against excessive uranium-import levels. It is not so much that the United States worries about fissionable material for nuclear warheads; there are thousands of warheads already in the U.S. arsenal (many fabricated originally with Canadian uranium), and though they might have to be reconstructed from time to time, it is not because their uranium or plutonium content has dissipated. By any reckoning, both materials have an extremely long "shelf" life.

Moreover, the United States has massive stockpiles of uranium, for both civilian and military purposes. And while the size of these holdings is classified information, some estimates have placed them in the range of 150 million pounds of U_3O_8. These stocks have enabled the U.S. government to abstain from any uranium purchases, for *any* purposes, since 1970.[113] In addition to the stocks of U_3O_8, the enrichment facilities operated by the DOE also possess immense holdings of depleted uranium ("depleted" in the sense that its U-235 content is less than that found in natural uranium). It is possible that in future the depleted UF_6 tailings might be recycled through the

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[111] Canadian participation in the uranium cartel is detailed in Larry R. Stewart, "Canada's Role in the International Uranium Cartel," *International Organization* 35 (Autumn 1981): 657-89.

[112] Interview, Washington, 20 June 1985. For the similar argument made in respect to Petro-Canada, see Ghislaine Cestre, *Petro-Canada: A National Oil Company in the Canadian Context* (Washington: U.S. Government Printing Office, 1977), pp. 18-19.

[113] Interview, Washington, 28 June 1985.

DOE's gaseous-diffusion plants in place of fresh natural-uranium feed. Finally, there are also holdings of enriched uranium.

One matter of some relevance to U.S. national-security concerns that should be raised is the possibility that the U.S. Navy may not in future be able to obtain a secure source of fuel for its nuclear-powered vessels, in the event of further erosion of domestic productive capacity. This is, admittedly, not an issue of any urgency; for the moment, government stocks continue to provide for the fuel needs of the nuclear navy. There is, however, some dispute in Washington over how much longer the stockpile disposals can continue. As may be imagined, it is far from easy to arrive at an accurate figure for such a sensitive matter as the Navy's consumption of nuclear fuel. Officials at the Department of Energy estimate that current annual military (mostly naval) demand in the United States is about 2 million pounds of U_3O_8; however, sources in the uranium industry challenge this estimate, and argue instead that military consumption averages between 5 and 6 million pounds a year.[114] They also maintain that the stockpile will be exhausted sometime during the 1990s. DOE officials, for their part, do not foresee such a rapid depletion of stocks; instead, they argue that the government's military stockpile is sufficiently large to supply defence needs into the next century, even in the unlikely event that *all* domestic productive capacity were to disappear.

There is one potential (if long-term) issue that relates both to national security and to imports, and it concerns the nonproliferation policies of Canada, which now supplies close to 80 percent of U.S. imported uranium. Canada does not allow its uranium to be used for *any* military purposes, which means that not only weapons-building but also propulsion reactors are proscribed from consuming its uranium.[115] In the event that the U.S. uranium industry were to disappear, and the stockpiles to dwindle, there would no doubt be some interesting moments for the Pentagon, as it grappled with the problem of sourcing its nuclear needs. This, as we have noted, is not likely to be a problem in the short run. It may well not be one even in the long run, for it is hardly likely the United States would lose its entire capacity to

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[114] Interviews, Washington, 28 June 1985.

[115] For an analysis of Canada's policy, see James F. Keeley, "Canadian Nuclear Export Policy and the Problems of Proliferation," *Canadian Public Policy* 6 (Autumn 1980): 614-27. Also see Marie-France Desjardins and Tariq Rauf, "Opening Pandora's Box? Nuclear-Power Submarines and the Spread of Nuclear Weapons," *Aurora Papers*, no. 8 (Ottawa: Canadian Centre for Arms Control and Disarmament, June 1988).

produce uranium economically. Indeed, even advocates of protection concede that what is left of the U.S. uranium industry has become competitive internationally, and one New Mexican mine - Mount Taylor - has recently signed an export contract with Japanese purchasers.[116]

Conclusion

The Canadian federal election of 21 November 1988, through popular endorsement of the FTA, will have some positive implications for the country's uranium industry, as we shall discuss in our final chapter. One can reasonably expect that the uranium-enrichment embargo, which had been employed against Canadian and other foreign uranium producers to great effect, will not be a weapon in the arsenal of U.S. protectionists in future. At least, it will not be a weapon that can be deployed against Canada, for the FTA gives the latter an exemption from this import-restriction device. Whether, in fact, any of the United States' foreign uranium suppliers must ever worry about Section 161(V) again remains uncertain at this writing, as a result of the recent Supreme Court decision.

Nor is it likely, for reasons we indicated in this chapter, that any of the unfair-trade remedies (e.g. antidumping or countervailing duty legislation) would be invoked to keep much Canadian uranium out of the U.S. market. The enormous discrepancy in ore grade between the Saskatchewan producers and U.S. ones (those in Ontario, obviously, are another matter altogether) would seem to preclude any U.S. producer's successful resort to either of these measures of contingent protectionism. To be sure, an antidumping petition specifically targeted at Rio Algom might be conceivable, but given the incredibly complex nature of the uranium market, it is hard to see how a U.S. company could easily identify LTFV trading in this commodity. Moreover, since Rio Algom has become "family" through its purchase of Kerr-McGee's mine, it is extremely unlikely the active New Mexican Congressional caucus would want to see it hauled before the ITC and ITA. As for Section 201, it too looks unlikely to serve as a path to import relief for the embattled U.S. industry, for reasons we indicated above. As with copper, so too with the uranium industry: it is hardly likely to invest too much money or time in this risky, because discretionary, provision of U.S. trade law.

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[116] Interview, Washington, 13 June 1989.

There are, however, some import-relief measures that are not precluded by the FTA, and that might conceivably be employed to achieve protection. Whether Canadian shipments would be negatively affected were any such measures implemented must remain, at this writing, an open question. Section 232 of the Trade Expansion Act of 1962 can, as we have argued, result in a Presidential decision to grant import relief, but we do not deem this to be likely to happen. But if it were to happen, the case for import relief must rest on a clear representation of the security risks attending any collapse of the domestic uranium industry. The FTA security-of-supply provisions, subject to much heated debate in Canada during the last election campaign, could be expected to dampen the attraction of the national-security argument insofar as that argument depends upon an *economic* construction of national security. There will always, however, remain a legitimate concern in the United States about secure access to fuel for the country's nuclear navy. In this last respect, it is possible that at some future date a case might be made for the retention of some domestic productive capacity in uranium, for the very good reason that the U.S. *cannot* (in policy if not in practice) use the uranium coming from its principal foreign supplier, Canada, for any military purposes whatsoever. Barring any alteration of Canadian nuclear-export policy, U.S. uranium producers will always have, at least in theory, a *prima facie* claim to be kept in existence, even if they are non-competitive.

6. The Effect of the Free Trade Agreement on Potash, Copper and Uranium

As of 1 January 1989 Canada and the United States have embarked upon a momentous process of trade liberalization, one that will see their bilateral trade altered in a number of ways. All tariffs are targeted, over time, for elimination; various non-tariff barriers will be removed; and a number of ground-breaking provisions concerning investment, services, and business travel will be put into place. Given the extremely broad nature of the bilateral agreement, few sectors of the Canadian economy will be left unaffected. The FTA will have important implications for the Canadian mining sector in general; no less will this be true for the three minerals upon which we have focused in this book. Thus, it would be remiss of us to conclude our analysis of the protectionist challenge in those three commodities without an assessment of the likely effect the FTA will have on them. We begin the assessment by exploring those aspects of the trade pact that can be expected to affect all three products in the same manner. Following this, we focus on the specific changes that are likely to be in store for each mineral, in the wake of the FTA.

The Generalized Effects of the Free Trade Agreement

One of the most basic features of the FTA is that it is an executive agreement rather than a treaty. The two governments assumed before they began negotiating that it might be very difficult for the Executive branch to garner the necessary two-thirds support in the Senate to pass a treaty - an assumption that, in the trade atmosphere of the time, made sense. Given the problematical nature of the undertaking, the White House sought and received (by a narrow margin) fast-track negotiating authority, which meant that the final agreement would be voted on as is without amendments on a yes-or-no basis, and that it need only be passed by a simple majority in both houses of the Congress. It also meant, of course, that the assurances embedded in treaty form might be somewhat less binding when given life through an executive

agreement; but even treaties, as the fate of the Reciprocity Treaty of 1854 indicates, can be abrogated.[1] In some sense, nevertheless, the form this bilateral trade accord has had to take might eventually prove troublesome. This is simply to state the obvious: that in a world of sovereign states, there can be no permanent guarantee of one country's access to another's market.[2]

A much more relevant element of the FTA is the accord's dispute-settlement mechanism. Realizing that trade irritants would continue to arise from time to time between them, Ottawa and Washington devised a series of new mechanisms intended to resolve or mitigate these disputes. In the event of a conflict, consultations would be held to determine if a negotiated settlement were possible; failing this, the matter would be submitted to a new Canada-United States Trade Commission. This Commission will have the authority to make binding decisions involving the FTA's safeguards provisions, but on all other matters the Commission will be able to make recommendations that the two governments are free to ignore. Decisions will be based on the Commissioners' legal interpretation of the text of the agreement, except in the case of the antidumping and countervailing duty cases, where they will assure, as we note below, that the relevant national laws have been correctly applied.[3]

The importance of the dispute-settlement mechanism for the potash, copper, and uranium industries is twofold. First and most important, the existence of an impartial Commission made up of representatives from both countries may discourage the launching of trade cases that are politically motivated. The dispute-settlement mechanism probably will not eliminate any protectionist biases within the United States International Trade Commission or the Commerce Department's International Trade Administration; but what it might do is deter officials of either body from excessive partisanship, given that their decisions will be reviewable by the bilateral Commission. As well, it may discourage companies from filing highly questionable cases that are designed merely to harass foreign competition. A second benefit of the

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1 For a good treatment of the first Canada-U.S. "free-trade" accord, see Donald C. Masters, *The Reciprocity Treaty of 1854* (Toronto: McClelland and Stewart, 1963).

2 For a discussion of this point, see David G. Haglund, "Unbridled Constraint: The Macdonald Commission Volumes on Canada and the International Political Economy," *Canadian Journal of Political Science* 20 (September 1987): 609-10.

3 Government of Canada, Department of External Affairs, *The Canada-U.S. Free Trade Agreement: Synopsis* (Ottawa, 1987), pp. 48-51.

dispute-settlement mechanism is that it speeds up the appeals process for trade disputes.[4] Currently, Canadian companies can and do suffer economically while they await the decisions of the U.S. courts, with the result being that often they still come out behind even if they win their case. We conclude, therefore, that the dispute-settlement provisions of the FTA should have beneficial implications for the Canadian mining industry.

The FTA also broke new ground in the area of investment. The two governments agreed not to discriminate in future against the investments from the other country; in other words, they granted each other national treatment, although they left in place existing exceptions to this principle. Both reserved the right to screen foreign investments, but the threshold at which monitoring will take place has been raised to $150 million. This will permit Canada to continue monitoring 75 percent of the number of takeovers that it currently scrutinizes. Takeovers by one foreign company of another, however, will no longer be screened.[5]

The effect of these provisions on the Canadian potash, copper, and uranium industries is not expected to be very great. The Canadian companies that mine these ores, because they are mostly large, fully integrated, and internationally competitive enterprises, will fall within the purview of the monitoring provisions discussed above; hence it is unlikely that any of them would be "captured" by hostile corporate raiders. On the contrary, if the FTA's investment provisions have any effect at all on these companies, it might be to make it easier for them to take over U.S. mining concerns.

In addition to the generalized effects of the Free Trade Agreement noted above, there are also provisions within the pact that will affect certain minerals but not others. Let us turn to the FTA's likely specific effects on the Canadian potash, copper, and uranium industries.

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[4] The Commission will issue an initial report on the facts of the case within three months of the appointment of a panel chairperson. A 30-day period of comment will ensue, after which a final report will be issued. Thus, the appeals procedure will take at most four months. Government of Canada, Department of External Affairs, *The Canada-United States Free Trade Agreement* (Ottawa, 1987), pp. 264-65.

[5] *Free Trade Agreement: Synopsis*, p. 44.

The Effect of the FTA on the Canadian Potash Industry

In chapter 2 we showed that the Canadian potash industry has again become the object of attention of the U.S. antidumping laws, with consequences that, at least in the short term, are (ironically) not entirely or even chiefly negative. Beneficial side-effects notwithstanding, it still is worth asking whether the Free Trade Agreement will do anything to minimize protectionism in this sector. In the short to medium term, the FTA will do little to help Canada's potash industry, and the long-term effect of the accord must remain uncertain.

Canadian and U.S. free-trade negotiators realized very quickly that harmonizing the antidumping laws of each country would be an extremely complex and difficult task, and they were also aware that the U.S. legislative timetable necessitated that an agreement be reached by the early fall of 1987.[6] Given these constraints, it was agreed very early on that the harmonization task would be left for future negotiations. Thus, the only reference in the agreement to antidumping was that the two governments would continue to try to negotiate an Antidumping Code over the next five years, or seven if necessary. In the meantime, national antidumping laws will remain in place and the Canadian potash industry will continue to be bound by the terms of the suspension agreement, and even after that expires in 1993 there is nothing to rule out subsequent antidumping petitions being filed by U.S. producers. ITA decisions will, it is true, be reviewable by the Canada-United States Trade Commission, but decisions will be overturned only if the U.S. antidumping laws have been incorrectly applied and the U.S. government agrees to implement the Commission's decision. In other words, the FTA does nothing to change the legal situation that the Canadian potash industry currently faces, although future bilateral negotiations could well alter this state of affairs. Whether these negotiations will actually improve the industry's situation must remain, at this writing, anyone's guess.

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[6] The U.S. fast-track negotiating authority was scheduled to run out on 1 January 1988, but a three-month period was required for Congress to review the deal before it could be officially signed.

The Effect of the FTA on the Canadian Copper Industry

The Canadian copper industry has been implicated in the new protectionism in the United States in two main ways: through the invoking of the U.S. escape-clause laws, and most recently through the potential threat of a countervailing-duty petition. The FTA will not obviate either such challenge, at least not in the next few years, but it should achieve some changes that will provide marginal benefits to the industry.

The agreement contains its own escape-clause provisions, and also makes a few important changes to national laws in each country. The FTA's escape clause allows either government to reintroduce a tariff at its previous level if there has been an import surge resulting from the removal of that tariff. An escape-clause action of this sort may not remain in effect for more than three years, and all such actions will cease at the end of the 10 year transitional period.[7] The Canadian copper industry is unlikely to be affected by this provision.

Much more important for the copper industry are the provisions of the FTA that deal with global escape-clause actions. The two governments agreed to exempt each other from such actions except where the other country's producers are a substantial contributor to the injury being suffered.[8] This provision will prevent Canada from being "sideswiped" by U.S. escape-clause actions that are aimed primarily at other countries but which could end up damaging the Canadian industry nevertheless. Had this provision been in place in 1978, it is unlikely that Canada would have been included in the global action that the ITC proposed.

The current threat, if one exists, facing the Canadian copper industry is no longer that of an escape-clause action but rather that of a potential countervailing-duty case, as we discussed in chapter 3. Does the FTA eliminate or reduce this threat? The agreement deals with the issue of subsidies in exactly the same way as it deals with dumping. Negotiators for each country realized that the question of what constitutes a subsidy was an extremely thorny and

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[7] *Free Trade Agreement*, p. 167.

[8] Imports will not be considered substantial unless they make up more than five percent of the total imports of a product category. Imports will be considered substantial if they account for more than 10 percent of total imports, and an investigation will follow to determine whether they were an important cause of serious injury. Ibid., pp. 1667-68.

controversial one, and that its resolution would take more time than they had available to them. Thus, it was agreed that the two countries would continue working on this problem, and they would attempt to reach an understanding within five years (or seven if necessary). The Canadian government will likely be put under some pressure in those negotiations to agree to a Subsidies Code that adopts the broad interpretations of the U.S. government, but it remains to be seen what the outcome of those negotiations will be. The only thing that is certain is that the current threat of countervailing duties will not disappear for at least a few more years. Indeed, it is more likely than not that success or failure in this area will be obvious within three years, for the United States will be eager to conclude the subsidy matter before the next general election in Canada, likely to be held in 1992.

One benefit of the FTA for the Canadian copper industry is the complete elimination of all tariffs between the two countries within 10 years, with some being done away with immediately and others in stages within five or 10 years. Tariffs on refined copper, alloys, waste and scrap, and master alloys will be eliminated by 1993 and tariffs on copper powders and flakes will be gone by the end of 1998.[9]

The effect of these measures for the Canadian copper industry will probably be positive. Canadian tariffs have been higher than those of the United States for all categories of copper products,[10] but it is unlikely that their removal will mean much, since the Canadian copper industry is quite competitive within the North American market. What is likely to help the Canadian industry, however, is the reduction of U.S. tariffs. These were not so high that they encouraged the processing of Canadian copper in the United States, but they did impose a cost on the Canadian copper industry. The Canadian industry viewed these tariffs simply as part of the cost of doing business in the U.S.

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[9] Government of Canada, *The Canada-U.S. Free Trade Agreement and Minerals and Metals: An Assessment* (Ottawa: Energy, Mines and Resources Canada, 1988), p. 36.

[10] The respective tariffs of the two countries for copper products were as follows in 1988: refined copper (Canada 0 to 10.3 percent, U.S. 1 percent); copper alloys (Canada 4 to 10.2 percent, U.S. 1 percent); waste and scrap copper (Canada 0 to 10.2 percent, no U.S. tariff); master copper alloys (Canada 10.3 percent, U.S. 2.6 and 6 percent) and copper powder and flakes (Canada 4 and 10.6 percent, U.S. 2.6 to 5.4 percent). Ibid., p. 36.

market; henceforth, this money will remain in the hands of the Canadian copper companies.[11]

The last aspect of the FTA that could possibly have an effect upon the Canadian copper industry concerns rules of origin for imported copper. To qualify for tariff-free status under the agreement, 50 percent of the manufacturing cost of an imported product will have to have been incurred in either country, or in both. In addition, the FTA also lays out guidelines concerning the amount of processing that can be done before a rules-of-origin test will be required. In the case of copper, the conversion of concentrates into blister copper will not require a rules-of-origin test, but the conversion of blister copper to more highly processed products such as cathodes will.[12] These provisions are unlikely to have much if any impact on the Canadian copper industry, in that there is almost no re-exporting of copper between the two countries.

The Effects of the FTA on the Canadian Uranium Industry

The most important provision of the FTA for the Canadian uranium industry relates to the prohibition on any further enrichment embargoes directed against Canada. In return for this exemption from the long arm of Section 161(V), Ottawa agreed to eliminate its requirement that Canadian uranium be upgraded prior to export to the United States.[13] Since the FTA went into effect, Canadian uranium gets processed wherever it is most economical to do so (above the Rio Grande, that is). The further-processing requirement still applies in the case of Japan and other consumers of Canadian U_3O_8. This may, but need not, have a somewhat adverse effect on the amount of uranium processing that takes place in Canada. Eldorado Nuclear contends that its recent $300-million investment in upgrading its facilities will make it cost-competitive so long as it has fair access to the main uranium markets. Thus, the FTA practically guarantees Canada access to the U.S. uranium market, thereby eliminating the single greatest trade threat to the Canadian uranium industry. But as we noted in chapter 5, the guarantee can be only a condition-

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[11] Ibid., p. 26.

[12] Ibid., p. 22.

[13] *Free Trade Agreement*, p. 149.

al one; and while we do not foresee any further impediments to Canadian uranium's access to the U.S. market in the short term, it would be unwise to conclude that, in this particular commodity, the protectionist threat has vanished for good.

The investment provisions of the FTA are also of some importance to the uranium industry. As we mentioned earlier, the agreement calls for each country to grant national treatment to the investors of the other for all future endeavors, but it leaves in place existing exceptions to this rule. The effect of this for the Canadian uranium industry is to grandfather the domestic-ownership rules for the uranium industry announced by the federal government on 23 December 1987. Under these rules, at least 51 percent of any uranium property must be owned or controlled by Canadians. Thus, the investment provisions of the FTA will in themselves do nothing to change the ownership patterns of the Canadian uranium industry.

Conclusion

It is apparent to us that the Free Trade Agreement provides benefits of differing degrees for Canadian producers of potash, copper, and uranium. Its dispute-settlement mechanism may possess some deterrent capability, and could reduce the number of politically motivated trade cases that are filed in the United States against Canada. The accord's speedier appeals procedures should help reduce the potential damage suffered by Canadian companies involved in trade disputes. And the improved escape-clause procedures, coupled with the removal of tariffs, should provide some slight benefit for Canadian copper producers. Finally, the pact will clearly make the United States a more (though probably never totally) secure export market for unprocessed and processed Canadian uranium.

However, some of the problems that we outlined in the earlier chapters of this book have not been resolved by the agreement. Most importantly, the failure of the negotiators to agree on a common code for antidumping and subsidies issues means that the kinds of threats faced recently by the Canadian potash and copper industries are unlikely to disappear, although it may well be that the liberalization ethos attending the FTA will serve to check any political - at least, Executive branch - support for U.S. industries launching trade actions against Canada. The FTA, in sum, does address many of the trade problems confronted of late by the Canadian potash, copper, and uranium industries, but the challenge posed by the new protectionism in the

United States has by no means disappeared for these industries. In our opinion, the new protectionism is likely to evolve in ways that may continue to present surprises to the Canadian mining industry, even though the outlook for that industry's access to the U.S. market is clearly better in the presence of the FTA than it would be in its absence.

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